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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 603

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY
and
THE STATE OF DELAWARE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Delaware Sports Service, a Delaware partnership comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware, entered on July 9, 1964, affirming a judgment entered on August 6, 1963, by the Superior Court of

the State of Delaware in and for New Castle County which affirmed the decision of the Public Service Commission of the State of Delaware that Respondent Diamond State Telephone Company was justified in concluding that Petitioner was using its telephone service to promote illegal activity.[1]

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, dated July 9, 1964, is unreported, but is reprinted in the Appendix to this Petition. (App. 1a; R. Sup. Ct., No. 7, p. 1)[2]

The opinion of the Superior Court of the State of Delaware in and for New Castle County, dated August 6, 1963, is reported at — Del. —, 196 A.2d.

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[1] Implicit in the decision of the Public Service Commission was a determination that Respondent Diamond State Telephone Company could lawfully terminate telephone service theretofore furnished to Petitioner herein.

[2] The record in this case is not paginated and consists of docket entries made in the courts and the administrative tribunal below at each stage of this case.

Citations to material included as part of numbered docket entries made in the Supreme Court of the State of Delaware will be as follows: "R. Sup. Ct., No. —, p. —".

Citations to material included as part of numbered docket entries made in the Superior Court of the State of Delaware in and for New Castle County will be as follows: "R. Super. Ct. No. —, p. —".

Citations to material included as part of numbered docket entries made in the Public Service Commission of the State of Delaware will be as follows: "R. Com., No. —, p. —".

Citations to material included as part of the Appendix to this Petition will be as follows: "App. —".

215 and is reprinted in the Appendix to this Petition. (App. 2a-17a; R. Super. Ct., No. 10, pp. 1-22)[3]

The findings and opinion of the Public Service Commission of the State of Delaware, dated September 12, 1962, the Commission's opinion on reargument, dated October 3, 1962, and the Commission's opinion relative to jurisdiction, dated December 14, 1961, are unreported but are reprinted in the Appendix to this Petition. (App. 18a-32a; 33a-34a; 35a-63a; R. Com., No. 19, pp. 1-20; No. 22, pp. 1-3; No. 12, pp. 1-34)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).[4]

QUESTIONS PRESENTED

(1) Is the due process clause of the Fourteenth Amendment to the Constitution of the United States violated where, based upon a record limited almost wholly to opinion evidence, hearsay and other inadmissible evidence, a public service commission upholds the right of a public utility to terminate telephone service furnished to a horse race reporting business engaged in communicating to customers the unofficial winners of races and nothing else?

(2) Is Petitioner, a horse race reporting business engaged in communicating to customers the unofficial

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[3] The Superior Court denied Petitioner's motion for reargument on October 7, 1963. (App. 18a; R. Super. Ct., No. 14, pp. 1-2)

[4] On July 9, 1964, the Supreme Court of the State of Delaware entered the judgment the subject of this Petition for a Writ of Certiorari and on July 22, 1964, entered its order denying the Motion for Reargument Pursuant to Rule 13 filed by the Petitioner herein. (App. 1a; R. Sup. Ct., No. 9, p. 1)

winners of races and nothing else, deprived of its right of free speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States where, based upon a record limited almost wholly to opinion evidence, hearsay and other inadmissible evidence, a public service commission upholds the right of a public utility to terminate telephone service and thereby prevent Petitioner from engaging in business?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution to the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 of Article 1 of the Constitution of the State of Delaware, Vol. 1, p. 154 Delaware Code Ann., provides:

"§ 5. *Freedom of Press; Evidence in Libel Prosecutions; Jury Questions*

"The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications, investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury may determine the facts and the law, as in other cases."

STATUTES INVOLVED

Section 671 of Title 11 of the Delaware Code provides in pertinent part:

"§ 671. *Definitions.*

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

"'Call service' means the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service; * * *"

Section 674 of Title 11 of the Delaware Code, provides:

"§ 674. *Business of disseminating gambling information; receiving gambling information*

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

STATEMENT OF THE CASE

The Parties

Petitioner, Delaware Sports Service, is a Delaware partnership comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman, with its principal place of business at Wilmington, Delaware. Respondent Diamond State Telephone Company is a public utility operating a telephone communication system in the State of Delaware pursuant to tariffs filed with the Public Service Commission of the State of Delaware. Respondent telephone company's operations have been actively regulated under the jurisdiction of the Public Service Commission since 1949.

Respondent State of Delaware was an original intervenor in this matter before the Public Service Commission.

Background of Controversy

Petitioner is engaged in the business of furnishing partial results of horse races immediately following completion of the race to its customers who pay in advance for the service and who request such information by telephone inquiry.[5] Petitioner's business is popularly known as a flash horse race news service and at all times material hereto, Petitioner furnished its customers with information limited to the name and number of the unofficial winner of any particular race.[6]

A controversy has existed for more than fourteen years between the family business interests repre-

[5] R. Sup. Ct., No. 3, p. 1.

[6] R. Sup. Ct., No. 4, pp. 5, 25-27.

sented by Petitioner and the public authorities of the State of Delaware as to the legally permissible limits under Delaware law of Petitioner's business activities in communicating flash horse race results to its customers. In fact, the Attorney General of Delaware has for many years attempted to terminate the business of Petitioner.[7]

In 1949, the State of Delaware, through its Attorney General instituted a criminal proceeding against Petitioner's corporate predecessor, Delaware Wired Music Company, Inc., and its officers, charging that they were engaged in the business of communicating horse race news in violation of Section 4063, Del. Rev. C. (1935), now Section 669, 11 Delaware Code Ann.[8] This effort to terminate Petitioner's business failed when the trial court directed a verdict of acquittal. *Tollin* v. *State*, 7 Terry 120, 78 A.2d 810 (New Castle County Court of General Sessions, 1951).

Thereafter, the Delaware Legislature, on recommendation of the then Attorney General, sought to proscribe this general type of business by enacting Chap. 493, 48 Del. L., which was approved by the Governor, January 28, 1952, and now is identified as current Sections 671-677 inclusive, 11 Delaware Code Ann.[9] Also on January 28, 1952, counsel for Delaware Wired Music Company, Inc., wrote to the Delaware Attorney General and to the City Solicitor and

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[7] R. Sup. Ct., No. 4, pp. 4-5.

[8] App. 3a; R. Super. Ct., No. 10, p. 3. See also, R. Sup. Ct., No. 4, p. 6.

[9] R. Sup. Ct., No. 4, pp. 6-7.

Superintendent of Public Safety for the City of Wilmington offering to make all of the corporation's records available to them for inspection and offering them the opportunity at any convenient time to inspect the corporation's operations.[10] In the same letter the corporation's counsel stated that it would also be glad to cooperate with said parties in legally terminating the company's contract to furnish service to its customers in the event they were able to furnish Delaware Wired Music Company, Inc., with proof that any of its customers were conducting activities forbidden by Delaware state law or by a Wilmington city ordinance.

On June 9, 1953, the Wilmington Police Chief addressed a letter to the now Respondent Diamond State Telephone Company asserting that Delaware Wired Music Company, Inc., was using its telephone service in illegal gambling activity.[11] The telephone company promptly notified the Delaware Wired Music Company that it would terminate its telephone service, but subsequently advised Delaware Wired Music on June 12, 1953, that the Wilmington Police Chief had officially withdrawn his June 9, 1953, letter.[12] Delaware Wired Music thereafter conducted its business until the end of 1953 when it sold out to the Petitioner herein.[13]

By a letter dated October 13, 1959, the Attorney General of Delaware requested that the Respondent

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[10] R. Com., No. 2, pp. 2-3.

[11] R. Com., No. 15, p. 1.

[12] *Ibid.*

[13] R. Com., No. 2, p. 1.

telephone company revoke its contract with Petitioner, asserting that he had reasonable grounds to believe Petitioner was engaged in the business of, and receiving compensation for, the dissemination of information in furtherance of gambling and for gambling purposes.[14] Respondent telephone company, by letter dated October 15, 1959, advised Petitioner that telephone service would be terminated on November 3, 1959, pursuant to Section 675, 11 Delaware Code Ann. and paragraph 20, Section 1, of the telephone company's tariff, P.S.C. Del. No. 1, on file with the Delaware Public Service Commission.[15] Petitioner filed an action in the Court of Chancery of the State of Delaware, in and for New Castle County, Civil Action No. 1208, praying for an injunction enjoining Respondent telephone company from removing its equipment or interfering with telephone service rendered to Petitioner, and for a mandatory injunction compelling the telephone company to maintain Petitioner's telephone service.[16] All parties moved for summary judgment before trial and, after a hearing, judgment was decreed for the Petitioner herein, the

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[14] App. 4a; R. Super. Ct., No. 10, pp. 4-6.

[15] App. 39a; R. Com., No. 12, p. 6. Section 675 provided as follows:

"§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

"No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

[16] App. 5a; R. Super. Ct., No. 10, p. 6.

Court holding that Section 675 was unconstitutional. *Tollin* v. *Diamond State Telephone Company,* 164 A.2d 254 (1960). In granting the injunction and holding Section 675 unconstitutional, the court held that telephone service to Petitioner could not be terminated without a hearing (before the Public Service Commission) "on the uses to which Plaintiff [Petitioner herein] put such service." *Tollin, supra,* at 164 A.2d 254, 258, 259.

PROCEEDINGS BEFORE THE PUBLIC SERVICE COMMISSION

Subsequent to the granting of the injunction in the *Tollin* case, Respondent telephone company sent a similar letter to Petitioner, dated November 28, 1960, stating that the telephone company had reasonable grounds to believe that the general telephone exchange and toll service furnished to Petitioner was being used in the business of disseminating information in furtherance of gambling and for gambling purposes in violation of Section 674 of Title 11, Delaware Code Ann.[17] That letter notified Petitioner that its telephone service would be terminated on December 15, 1960, unless before that time Petitioner filed a Complaint with the Public Service Commission seeking to have that body determine the nature and lawfulness of its operations and decide whether the telephone company should be required to continue to provide telephone service to Petitioner. On December 14, 1960, Petitioner filed a petition with the Public Service Commission, praying that the Commission conduct a hearing to determine whether Respondent telephone company had rightful cause to discontinue telephone service to

[17] App. 35a-36a; R. Com., No. 12, p. 1.

Petitioner.[18] On June 28, 1961, the Commission granted the Delaware Attorney General's motion for leave to intervene in the proceeding.[19]

The Commission held public hearings during the period March 12-15, 1962, hearing sixteen witnesses and admitting into evidence forty-eight exhibits. Throughout the public hearings Petitioner repeatedly objected[20] to the admission into evidence of hearsay,[21] irrelevant matter,[22] illegal evidence,[23] opinion,[24] and the statements of a dead man,[25] contending that such evidence did not establish the existence of the alleged illegal activities in question. All such objections were overruled by the Commission. In its brief filed with the Commission, the Petitioner contended that the improper admission of and reliance upon this evidence was violative of its rights under the Due Process Clause of the Fourteenth Amendment to the Constitu-

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[18] R. Com., No. 2, p. 5.

[19] R. Com., No. 5, p. 1.

[20] Extracts from the transcript of the proceedings before the Public Service Commission, reflecting Petitioner's objections referred to in footnotes 21-25 of this Petition, are set forth in the Appendix, App. 64a-78a, and are cited therein as "Tr. —".

[21] App. 64a-71a; R. Com., No. 25, pp. 26, 27, 70, 89, 117; No. 25a, pp. 234, 253, 242, 266, 276, 279, 300; No. 26, pp. 310, 318, 323, 329, 330, 361-366.

[22] App. 71a-75a; R. Com., No. 25, pp. 10, 16, 18, 162, 166-167; No. 25a, pp. 228, 238, 239, 259, 263, 298, 303; No. 26, p. 366.

[23] App. 75a-77a; R. Com., No. 25, pp. 22, 24; No. 26, p. 310.

[24] App. 77a; R. Com., No. 25, p. 30.

[25] App. 78a; R. Com., No. 25a, p. 293.

tion of the United States[26] and that, the granting of a right to Respondent telephone company to circumscribe the reporting of a legal event deprived Petitioner of its right of free speech and press under the First and Fourteenth Amendments to the Constitution of the United States.[27] In its September 12, 1962, findings and opinion, supplemented by its October 3, 1962, opinion on reargument, the Public Service Commission decided that Respondent telephone company was "justified in concluding that Petitioner was using its telephone service to promote illegal activity"[28] and, in effect, upheld the issuance

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[26] R. Com., No. 15, pp. 31-32. "While it is recognized that this Commission is not bound by the strict rules of evidence that apply in a Court of law, yet in a proceeding of the present kind it cannot determine a matter where the 'great weight of evidence . . . to support a finding is incompetent.' (United States ex rel Vajauer v. Commissioner of Immigration, 273 U.S. 103, 47 S. Ct. 302 (1926). To do so is a violation of due process."

R. Com., No. 18, pp. 7-8. "• • • The Public Service Commission, as is the case with most administrative agencies, is given relative freedom in determining what evidence it may admit, but is required by the prevailing case law to justify its holding on legally competent evidence. • • •

• • • •

"This rule is in accordance with the general body of law and is generally known as the 'legal residuum rule. • • • • '"

[27] R. Com., No. 15, pp. 28-29: "Both the Constitution of the United States (Amendment No. 1) and the Constitution of the State of Delaware, (Art. I, § 5) guarantee the freedom of the press. The Federal Constitution also guarantees against any violation of the right of freedom of speech. (Amendment No. 1) Under the Fourteenth Amendment to the United States Constitution the States were prohibited from making or enforcing any law which abroga' . the right guaranteed by the United States Constitution. Certainly the right to report a legal event cannot be circumscribed. • • • • "

[28] App. 32a; R. Com., No. 19, pp. 19-20.

of the telephone company's November 28, 1960, letter. The Commission's decision was based on its earlier opinion dated December 14, 1961,[29] in which it concluded that it had jurisdiction to determine the nature of the use to which Petitioner put the telephone facilities furnished to it by the telephone company, and to order the telephone company to conform to any duties imposed upon it by Delaware law.[30] The Commission stated in its decision on the merits that it had considered in the case only that evidence which was within the direct knowledge or experience of the witness, or given previously before a competent tribunal under oath, or in sworn statements, or facts submitted by stipulation, and that it had disregarded much of the documentary evidence offered by Respondent State of Delaware and dealing with investigations made by police officers who did not testify at the public hearing in this matter, "* * * because to admit such evidence would violate basic standards of administrative fairness. * * * * *"[31]

The Commission did not expressly consider the question presented concerning free speech.

PROCEEDINGS BEFORE THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR THE COUNTY OF NEW CASTLE

Petitioner appealed from the decision of the Public Service Commission to the Superior Court of the State of Delaware in and for the County of New Castle contending that it had been deprived of its property without due process of law in violation of the

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[29] App. 35a-63a; R. Com., No. 12, pp. 1-34.

[30] App. 59a; 18a-19a; R. Com., No. 12, p. 30; R. Com., No. 19, p. 1.

[31] App. 24a-25a; R. Com., No. 19, p. 10.

Fourteenth Amendment to the Constitution of the United States and that permitting the termination of a business which reports a legitimate news event violated its rights under the First Amendment to the Constitution of the United States and under Article I, Section 5, of the Constitution of Delaware.[32]

In affirming the Commission's final decision, the Superior Court held that the Commission was justified in concluding Respondent telephone company had reasonable cause to believe its telephone service was being used to promote illegal activity.[33] The Superior Court further held that the dissemination of "flash" horse race news furthered illegal gambling and was against public policy.[34] That Court rejected Petitioner's claim that it had been deprived of due process,[35] but did not expressly consider Petitioner's claim that it had been deprived of its right of free speech.

PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF DELAWARE

In its brief filed in the Supreme Court of the State of Delaware, Petitioner contended that the Commission's decision was not based upon substantial admissible evidence, and therefore violated Federal

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[32] R. Super. Ct., No. 1, p. 1; No. 5, pp. 24, 35-36, 41 and 47.

[33] App. 6a, 9a, 12a and 17a; R. Super. Ct., No. 10, pp. 7, 11, 15 and 22.

[34] R. Super. Ct., No. 10, p. 22.

[35] R. Super. Ct., No. 10, p. 13.

requirements of due process.[36] Petitioner also contended that the Public Service Commission's decision necessarily would result in the proscription of its legitimate news business, in violation of the First Amendment to the Constitution of the United States.[37]

On July 9, 1964, the Supreme Court of the State of Delaware entered its judgment affirming the judgment of the Superior Court in and for New Castle County on the opinion rendered by the lower court in *In re Delaware Sports Service,* 196 A.2d 215 (1963). Thereafter, Petitioner timely filed its Motion for Reargument Pursuant to Rule 13 and on July 22, 1964, the Supreme Court of the State of Delaware entered its order, without opinion, denying Petitioner's Motion.

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[36] R. Sup. Ct., No. 3, p. 31:

"While the strict rules of evidence don't apply before a regulatory body there must be substantial properly admissible evidence upon which to base a decision. (*National Labor Relations Board* v. *Columbian, etc. Co.*, 306 U.S. 292, 59 S. Ct. 501, 83 L. Ed. 660) the decision in *Schware* v. *Board of Exam. of State of N.M.*, 77 S. Ct. 752, 353 U.S. 232 (Supreme Court of the United States 1957) is apposite in the instant case. * * * *."

[37] R. Sup. Ct., No. 3, pp. 12 and 16.

"The Intervenor has continually emphasized the speed of Appellant's service. There is nothing in 11 D.C. 674 which restricts it to the dissemination or receipt of information to any period of time. * * *

* * * *

" * * * A restriction, unlimited in time, on the reporting of a legitimate sporting event or other event violates the First Amendment to the Constitution of the United States. If 11 D.C. 674 be limited to news of events prior to their happening then it might be valid, but not violated by Appellant."

REASONS FOR GRANTING THE WRIT

Important and Unsettled Questions Regarding the Evidentiary Basis Upon Which a State Consistent With the Requirements of the Due Process Clause of the Fourteenth Amendment May Authorize the Termination of Telephone Service and Thereby Prevent Petitioner From Engaging in Its Business, Should Be Settled By Pronouncement of This Court

This case concerns the efforts of the State of Delaware to bar Petitioner from engaging in the business of collecting and transmitting to paying customers by telephonic means the unofficial winners of horse races and nothing else.[38] In the civil proceedings below which were instituted by Petitioner for the purpose of testing the power of Respondent telephone company to terminate telephone service to Petitioner, the Public Service Commission held that the Respondent telephone company was empowered to terminate service since it was justified in concluding that Petitioner was using its telephone service to promote illegal activities. The important question presented on this record is whether or not the State of Delaware, in authorizing a public utility to terminate Petitioner's telephone service, has deprived Petitioner of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. By virtue of the decision below Petitioner will be deprived of its right to engage in a business lawful in itself even

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[38] It is important to note that Petitioner does not transmit information relative to changing betting odds, pay-off prices, jockeys' weights, or related information. R. Com., No. 27, pp. 526, 585, 607-610, 669; Compare: *Piotnick* v. *Pennsylvania Public Utility Commission*, 143 Pa. Super. 550, 18 A.2d 542 (1941) where the telephone service activity complained of was integrated with the furnishing of horse race entries, odds, scratched entries, jockeys, positions for races, and recommended bets in respect of same.

though the decision below rests almost wholly upon opinion evidence, hearsay and other inadmissible evidence. Petitioner asserts that a decision so lacking in a rational evidentiary basis offends the requirements of the Due Process Clause of the Fourteenth Amendment.

This Court has held that a State may not exclude a person from engaging in a profession or any other occupation except in a manner or for reasons which are consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. No such state action is consistent with due process unless it rests upon a rational evidentiary basis. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957). Although information emanating from Petitioner may be used for unlawful as well as for lawful purposes, the business activity of Petitioner, considered apart from the activities of persons using such information, is lawful in and of itself.[39] The type of information transmitted by Petitioner herein to its customers on a "flash" basis has been transmitted with impunity in Delaware by radio and television stations on a live broadcast basis.[40] The assertion by the State of Delaware of the power effectively to prohibit business activity by Petitioner, which is lawful and permitted when engaged in by other media, merits the attention and consideration of this Court.

The decision below rests entirely upon the rationale that if the recipient of information could use it for a purpose prohibited by law, the bare communication of that information by a business organization other-

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[39] Cf. *People* v. *Pollack,* 204 Misc. 64, 120 N.Y.S. 2d 363, at pp. 365-366 (1953).

[40] R. Com., No. 26, p. 351; No. 27, pp. 504, 527-528.

wise lawful in character may be prohibited consistent with the requirements of the Due Process Clause. Insofar as this Petitioner has been able to determine this Court has never decided under what circumstances a State may proscribe as unlawful the use of telephone facilities to transmit information which could be used for unlawful activity without the necessity for proving a criminal conspiracy or other unlawful relationship between the person initiating and the person receiving such information. Notwithstanding the total absence of evidence showing any such conspiracy or relationship between Petitioner and any customer engaged in unlawful activity, the Public Service Commission decided that telephone service available to all other members of the public may be denied Petitioner's news service business based upon a showing by opinion evidence to the effect that such racing news is of no value to persons other than those engaged in illegal activity, and even though it is clearly suggested by that same opinion testimony that the information supplied by Petitioner is of no practical value for gambling purposes unless accompanied by applicable changing racing odds.[41] While the several States have admitted power to proscribe or regulate gambling activity, proper standards or guidelines should be established by this Court

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[41] R. Com., No. 25, p. 124; No. 26, pp. 480-481. In *People* v. *Pollack*, 204 Misc. 64, 120 N.Y.S. 2d 363 (1953), the court quoted from a report of the Thoroughbred Racing Protective Bureau, Inc., at 120 N.Y.S. 2d 369:

> "• • • illegal bookmaking cannot exist on a large scale without prompt information by bookmakers on races being run throughout the United States. This information must include a rundown of the odds on each horse in each race as they change prior to the running of the race. It must include the exact time that the race is off and the prompt report of the result of the race including the prices paid. • • • • "

indicating the requirements imposed by the Due Process Clause upon a State which asserts the power to forbid legitimate business activity.

The courts of several States have rendered decisions which recognize the fact that a horse race news reporting activity, lawful in and of itself, is not made criminal or forbidden activity merely because some other person may utilize information supplied by that business in the commission of an unlawful act. In *Pennsylvania Publications* v. *Pennsylvania Pub. U. Com'n,* 349 Pa. 184, 36 A.2d 777 (1944), which involved facts substantially identical[42] to those in the instant case, the court reversed a decision of the Pennsylvania Public Utility Commission which had authorized the termination of telephone service to the Petitioner therein, a horse race news reporting business, on the ground that it had engaged in the dissemination of information in furtherance of illegal gambling in violation of Pennsylvania law.[43] The

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[42] It is important to note that in *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471, 476 (D.C.N.D. Ill., E.D., 1962), 220 F. Supp. 621 (D.C.N.D. Ill., E.D., 1963), aff'd *per cur.* 376 U.S. 782, 12 L. Ed. 2d 83 (1964) the facts involved were substantially *different* from those in this case. In the *Illinois Bell* case a three judge court upheld the right of the telephone company to deny telephone service to a horse race news reporting business. There, the business enterprise transmitted the names of the horses finishing first, second, and third in any given race and the price or odds paid at the track for a bet placed on the winning horse. The Petitioner herein reports to its customers only the name and number of the unofficial winner of the race and nothing else.

[43] 66 Pennsylvania Statutes § 1702 provides: "*Private wire for gambling information prohibited.* It shall be unlawful for any public utility knowingly to furnish to any person any private wire for use or intended for use in the dissemination of information in furtherance of gambling or for gambling purposes."

Supreme Court of Pennsylvania held that the reporting of the results of races, and nothing else, did not constitute unlawful activity and that there was absolutely no evidence to indicate that the horse race news reporting business was engaged in an unlawful enterprise. In language here apposite, the court said, at 36 A.2d 777, 779-780:

> "It is well established that it is the duty of a telephone company to furnish service and facilities without discrimination in favor of or against anyone who will pay the applicable tariff rates and abide by the reasonable regulations of the utility * * *. This obligation, however, is limited to lawful service * * *. However, such companies are not justified in refusing service to persons engaged in legitimate enterprises merely because such subscribers may furnish information over the facilities which may enable others receiving it to use the same illegally. In this connection, it is stated in Wyman on Public Service Corporations, Vol. 1, § 612, p. 500: '* * * it makes no difference to the right to service that illegal conduct may happen after the service is complete, provided that such conduct will be really independent of the service asked. * * * * *'
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> * * * *
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> "'* * * The information given by appellant over its telephones was limited to furnishing of results of races according to the number assigned to the horse in the publication. There is no contention here that any other information was afforded. Appellant did not make available fluctuating odds, which are absolutely essential to the gambler; nor did it receive or accept bets of any kind. 'The furnishing or receiving of racing or sporting information is not gambling and is not a crime': Appeal of American T. & T. Co., 126 Pa. Super. 533, 539, 191 A. 210, 213. The

record here is entirely barren of anything which would in any way cast doubt on the legitimacy of appellant's business. We are not so gullible as to suppose that the race results obtained over the telephone from appellant do not to some extent facilitate the paying off of bets, already placed, and no doubt are used for that purpose by bookmakers. Similarly, the publication by the newspapers of the country or the announcement over the radio of the results of baseball and football games, prize fights and other such activities may be an aid to gamblers, yet no one would seriously contend that the furnishing of such news was against the public policy of this Commonwealth, and therefore such newspapers and radio stations should be deprived of telephone or teletypewriter service.

"* * * Here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise. All that was here shown was that some recipients of the news distributed by appellant used or may have used it for an unlawful purpose. It would be just as absurd to contend that manufacturers of playing cards and dice were aiding and abetting gambling and should be denied telephone service because policemen found such objects when raids were made, as it is to argue that the appellant in the instant controversy should be refused service because 'in the past several years practically every one of the numerous raids conducted by the Philadelphia vice squad on bookmakers and bookmaking establishments have revealed the use of complainant's publication.'"

Similarly, in *People* v. *Pollack,* 204 Misc. 64, 120 N.Y.S. 2nd 363 (1953), the court acquitted five defendants of charges that they had engaged in a conspiracy, contrived a lottery, engaged in bookmaking,

and operated a policy game in violation of New York laws in connection with their operation of a horse race news reporting business. The court held that it was not a violation of New York law merely to transmit information which could be used for illegal purposes since the transmission alone was lawful in itself. The court said at 120 N.Y.S. 2nd 363, 365-366:

> "Both reason and authority would seem to negate the position taken by the District Attorney, for it is not the information conveyed to the bookmakers through the instrumentalities of the defendants and the Delaware Wired Music Company[44] that is illegal, *but it is the use to which that information is put which is illegal.* Many of the New York newspapers devote a great deal of their space to the outpourings of handicappers engaged by them which attempt to predict the outcome of races to be run. Could it seriously be contended that because that information is used by persons to gamble and in bookmaking that the sports reporters and the newspapers which disseminate such information could be held liable for aiding and abetting in the crime of bookmaking?
>
> "If the contention urged by the People is sound, every manufacturer of playing cards and dice knowing or being chargeable with the knowledge that in many cases those cards and dice would be used by professional gamblers, would be guilty merely because of the manufacture and distribution of those cards and dice. It is obvious on reflection, that it is not the manufacture of those articles and their distribution that is illegal, but the use to which they are put."

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[44] The Delaware Wired Music Company which appeared in the *Pollack* case as *amicus curiae* was the corporate predecessor of the Petitioner herein.

The present civil proceeding is indistinguishable from a criminal proceeding in one of its most practical results—Petitioner will be forced out of business. Two far reaching questions should be answered: May a State forbid conduct inherently lawful, in and of itself, without the necessity for first proving some conspiracy or other unlawful interrelationship between the initial lawful conduct and the subsequent illegal activity? If a State has such power, may it be invoked in an administrative decision based upon evidence which is wholly limited to opinion testimony, hearsay and other evidence which the Attorney General of Delaware has admitted would not be admissible in a court of law?[45]

The Public Interest Requires That This Court Determine the Extent to Which the Arbitrary Denial by a State of Access to Telephone Facilities and Service Constitutes a Denial of the Right of Free Speech and Press Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States

Petitioner asserts that the judgment of the Supreme Court of the State of Delaware, affirming a holding that Respondent telephone company was justified in concluding that telephone lines were being used in furtherance of illegal activity and that Petitioner, therefore, may be permanently denied their use, effectively deprives Petitioner of the right of free speech and press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

While no decision of this Court has been found which expressly recognizes telephonic communication as

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[45] App. 11a; R. Super. Ct., No. 10, pp. 13-14.

being within the ambit of constitutionally protected free speech and press, this Court has recognized that neither the social value of the communication nor the mere method of communication necessarily should affect the right freely to disseminate information. *Winters* v. *New York*, 333 U.S. 507, 511 (1948); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 689 (1959). It is no longer open to doubt that the liberty of speech and press are within those liberties protected against State action by the Due Process Clause of the Fourteenth Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931). Moreover, this Court held that where efforts are made at the State level to control or restrict the right of free expression, such efforts must meet strict standards of justification even where business or economic activity is involved. In *Thomas* v. *Collins*, 323 U.S. 516 (1945), the Court said, at pp. 530-531:

> " * * * any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. * * * *
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> * * * *
>
> "* * * it does not resolve where the line shall be drawn in a particular case merely to urge * * * that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so. * * * * "

The unresolved question in the case under consideration is whether and under what circumstances a State

may authorize an administrative tribunal and public utility to deprive any citizen permanently of his right to use the telephone in common with all other members of the public. Surely, a State may not consistent with the guaranty of free speech and press impose a blanket prohibition upon the use of telephone lines based upon a record of competent evidence which indicates only that information was being communicated which *could* be used for an unlawful purpose.[46] Under the facts of this record, it is as much a deprivation of Petitioner's rights of free speech and press to deprive it of the right to use the telephone, absolutely essential to the conduct of its business, as it would be to permit the lawful existence of newspapers and broadcast media but to forbid the communication of similar information by them to their customers on the ground that such information could be used for illegal purposes.

The record in this case has been relied upon to support an absolute refusal to permit Petitioner access to the only means it has of communicating information. The questions raised by Petitioner in challenging the constitutional adequacy of that record are of broad application and importance to persons similarly dependent upon access to but a single means of communication with their customers.

The pronouncement of this Court is needed to establish the limits imposed by the First and Fourteenth Amendments upon the power of the States to forbid legitimate business activity by denying access to the means of communication involved in this case.

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[46] R. Com., No. 25a, pp. 179-180; No. 26, pp. 377-378.

CONCLUSION

It is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 78, 1963

In the Matter of

DELAWARE SPORTS SERVICE, a Partnership, *Appellant*

and

THE DIAMOND STATE TELEPHONE COMPANY, *Appellee*

and

THE STATE OF DELAWARE, Intervenor Below, *Appellee*

(July 9, 1964)

Appeal from the Superior Court.

• • • • • • • • • • •

TERRY, *Chief Justice*, WOLCOTT, *Justice*, and WRIGHT, *Judge*, sitting.

Per Curiam

The judgment of the Superior Court is affirmed on the opinion of the court below. *In The Matter Of Delaware Sports Service, A Partnership*, 196 A. 2d 215.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Order

AND NOW, TO-WIT, this 22nd day of July, A.D. 1964, the Petition for Reargument filed by the Appellant having been duly considered by the Court,

IT IS ORDERED that the Petition of the Appellant for Reargument be and it hereby is denied.

BY ORDER OF THE SUPREME COURT:

/s/ T. E. TOWNSEND, JR.
Clerk

Opinion

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

No. 1321 Civil Action, 1962

In the Matter of

DELAWARE SPORTS SERVICE, a Partnership

(August 6, 1963)

* * * * * * * * * * *

STIFTEL, *J.*:

Appeal from an order of the Public Service Commission which refused to direct the Diamond State Telephone Company to continue its telephone service to the Delaware Sports Service.

The following facts are not in dispute:

The Delaware Sports Service has been located in Wilmington, Delaware, for more than a decade. Its only reason for existence is to supply "flash race track results" to its customers. Generally, its method of operation is to place an employee inside a race track who instantaneously communicates, by visual device, such as hand signals, or by radio, with an employee outside the race track who has an open telephone line to relay the information he acquires to Delaware Sports Service in Wilmington. For many years Delaware Sports Service, or its predecessor in name, Delaware Wired Music, supplied instantaneous detailed information on each race to the Wilmington headquarters but in recent years only the name of the winner of each race has been supplied. However, any customer on the open line from the race track through the Wilmington switchboard was able to determine the time the horses left the post and the time the horses finished the race.

A person became a customer of Delaware Sports Service by telephoning the Wilmington office and asking the operator of Delaware Sports Service what Delaware Sports

Service had available. The customer was told that he was entitled to the name of the unofficial winner of one race for $20; of two races for $30; and of five races for $50. The money was payable in advance by sending a Western Union money order telegram to Delaware Sports Service. The customer seldom used his own name when calling Delaware Sports Service for the results. When a person would call for results, the switchboard operator would immediately check her records so as to determine whether or not the money order had been transmitted in advance. If so, she would give the customer the immediate result, which was usually no more than one to three minutes after the race was run and sometimes sooner.

For many years the Attorney General's office had attempted to terminate the business of the Delaware Sports Service. After an unsuccessful attempt to terminate this business through the courts in 1949, *Tollin* v. *State*, 7 Terry 120, 78 A. 2d 810, the Legislature, on the recommendation of the then Attorney General, enacted certain statutes which the Attorney General hoped to use to eliminate businesses of this nature.[1]

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[1] See 11 Delaware Code Secs. 671-677, which read as follows:

"§ 671. Definitions.

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

" 'Call service' means the furnishing of information upon request therefor or by pre-arrangement over general telegraphic, telephone or teletypewriter exchange or toll service;

" 'Dissemination' means the act of transmitting, distributing, advising, spreading, communicating, conveying or making known;

" 'Person' or 'whoever' means a corporation (including a public utility), partnership or association, as well as a natural person;

" 'Private wire' means any and all service equipment, facilities, conduits, poles, wires, circuits, systems by means of which service is furnished for communication purposes, either through the medium of telephone, telegraph, Morse, teletypewriter, loudspeaker or any other means, or by which the voice or elec-

The present phase started in 1959. On October 13, 1959, the Attorney General sent a letter to the Diamond State Telephone Company requesting it to discontinue its service to Sports Service; whereupon Diamond State notified Dela-

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trical impulses are sent over a wire, and which services are contracted for or leased for service between two or more points specifically designated, and are not connected to or available for general telegraphic, telephonic or teletypewriter exchange or toll service, and includes such services known as 'special contract leased wire service', 'leased line', 'private line', 'private system', 'Morse line', 'private wire', but does not include the usual and customary telephone or teletypewriter service by which the subscriber may be connected at each separate call to any other telephone or teletypewriter designated by him only through the general telephone or teletypewriter exchange system or toll service;

"'Public utility' means a person, partnership, association or corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

"§ 672. Furnishing wire to disseminate gambling information

"No public utility shall knowingly furnish to any person any private wire for use or intended for use in the dissemination of information in furtherance of gambling or for gambling purposes."

"§ 673. Using wire to disseminate gambling information; receiving gambling information

"No person shall knowingly use any private wire in the dissemination of or receive information in furtherance of gambling or for gambling purposes."

"§ 674. Business of disseminating gambling information; receiving gambling information

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

"§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that

ware Sports Service of its intention to discontinue telephone service to it pursuant to Title 11, Delaware Code, Sec. 675.

Shortly after the receipt of the Diamond State letter, Sports Service filed an action, on October 22, 1959, in the Court of Chancery, praying that Diamond State be enjoined from discontinuing its telephone service, contending that Sec. 675 of Title 11, Delaware Code was unconstitutional.

On September 8, 1960, the Court of Chancery ruled Section 675 unconstitutional because it failed to provide an opportunity to the telephone subscriber for a hearing, and the Court enjoined Diamond State from terminating plaintiff's present telephone service prior to a hearing presumably before the Commission on the uses to which plaintiff put such service. See *Tollin* v. *Diamond State Telephone Co.*, Del. Ch., 164 A. 2d 254. Thereafter, the Attorney General again requested the Telephone Company to discontinue telephone service to Sports Service. Whereupon, Diamond State notified Sports Service that it would

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any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

"No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

"§ 676. Violations and penalties

"Whoever violates any of the provisions of Sections 671-677 of this title shall pay the costs of prosecution and be fined not less than $500 nor more than $5,000, or imprisoned not more than 12 months, or both."

"§ 677. Sections 671-676 as exercise of police power; construction

"§ 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

terminate its telephone service unless Sports Service filed a petition with the Public Service Commission by a certain date. Sports Service filed a petition with the Public Service Commission seeking to prohibit the telephone company from terminating its services. As a preliminary step the Commission decided, on briefs, by written opinion dated December 14, 1961, that it had jurisdiction to consider the petition. The Attorney General's request to intervene was granted.

A hearing on the merits of the petition was held by the Commission March 12, 1962, through March 15, 1962. The intervenor presented 9 witnesses and introduced 26 exhibits. At the conclusion of the hearing, the facts and the law were briefed and the Public Service Commission rendered a written opinion on September 12, 1962, concluding, in effect, that Diamond State was justified in its action because Delaware Sports Service was using its service to further illegal gambling. Subsequently, a motion requesting reargument and reconsideration was filed and the the request was denied on October 10, 1962. Sports Service then took this appeal claiming (1) that the hearing before the Public Service Commission was a denial of due process of law; (2) that the findings of the Commission failed to comply with the laws pertaining to hearings before the Public Service Commission, namely, 26 Delaware Code, Secs. 183 and 187;[2] and (3) that the Diamond

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[2] 26 Del. Code, §§ 183 and 187, read as follows:

"§ 183. Rules governing conduct of hearings [before the Public Service Commission]; findings and order

"(a) All hearings before the Commisison, or its designated representative, shall be public, and shall be conducted in accordance with the rules of practice and procedure prescribed by the Commission. In the conduct of such hearings, the Commission shall not be bound by the technical rules of evidence. A full and complete record shall be kept of all proceedings had before the Commission, or its representative, in any formal hearing, and all testimony shall be taken down by a reporter designated by the Commission, and the parties shall be entitled

State Telephone Company and the intervenor failed to establish their case by a preponderance of the evidence.

At the hearing, the telephone company argued that it had the right to act to discontinue telephone service to Delaware Sports Service because such service was being used by recipients to further illegal horse race gambling in this state and in other states. Specifically, Diamond claimed it had the right to act by virtue of Sec. 674 of Title 11, Delaware Code, or by reason of tariff No. 1, paragraph 20,[3] which it had previously filed with the Public

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to be heard in person or by attorney, and to introduce evidence.

"(b) After the conclusion of the hearing, the Commission shall make and file its findings with its opinion, if any, and its order thereon. Its findings shall be in sufficient detail to enable the court on appeal to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence."

"§ 167. Privilege against self-incrimination

"No person shall be excused from testifying or producing any book, document or paper in any investigation or inquiry by or upon hearing before the Commission, or any member or examiner thereof, upon the ground that the testimony, evidence, book, document or paper required of such person may tend to incriminate such person or subject such person to penalty, or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall, under oath, have testified or produced incriminating evidence. No person so testifying shall be exempt from prosecution or punishment for any perjury committed by such person in his testimony. Nothing contained in this section is intended to give, or shall be construed in any manner to give any corporation immunity of any kind."

[3] Tariff No. 1, paragraph 20, reads as follows:

"20. USE OF SERVICE FOR UNLAWFUL PURPOSES

"Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

Service Commission, or under the principle that it is never required to furnish telephone service where the use by the subscriber is against the public policy of this state.

A telephone company must furnish adequate public service to its paying customers without discrimination. 26 Del. Code § 135. See *Tracy* v. *Southern Bell Telephone and Telegraph Co.*, D.C. Fla., 37 F. Supp. 829, 830. It cannot refuse service to a legitimate enterprise. See *Paterson Publishing Co.* v. *New Jersey Bell Telephone Co.*, 21 N.J., 460, 122 A. 2d 599, 603. Generally, however, a telephone company may take the necessary steps to discontinue such service where it is reasonably satisfied that such service is being utilized by its customer to violate the statutory law against dissemination of racing information, *State* v. *Chesapeake and Potomac Telephone Co.*, 121 W. Va. 420, 4 S.E. 2d 257, 258; or, where the dissemination of such racing information is in violation of one of its published tariffs, *McBride* v. *Western Union Telegraph Co.*, 9 Cir., 171 F. 2d 1; see *Hamilton* v. *Western Union Telegraph Co.*, D.C. Ohio, 34 F. Supp. 928, 929; or where the use of such telephone service is against public policy, such as in the furtherance of bookmaking, an illegal enterprise in this and other states, *Tracy* v. *Southern Bell Telephone Co.*, *supra*; see *Taglianetti* v. *New England Telephone and Telegraph Co.*, 81 R.I. 351, 103 A. 2d 67, 70, 71; *Anno*: 153 *A.L.R.* 463.

Sections 674 and 677, Title 11, Delaware Code, makes dissemination of information in furtherance of gambling or for gambling purposes by means of a call service a crime.[4] The published tariff permits the telephone company to discontinue service if a law enforcement agency advises that such service is being used or will be used in violation of a law. Sports Service raises many objections

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[4] This statute was upheld as not in violation of freedom of speech in *State* v. *Michael C. Benicky, et al.*, Criminal Actions Nos. 96, 97, 98, 1960, Super. Ct. Del., Kent Co. (Storey, J., unreported decision dated March 28, 1961), where the Court also stated that it was not vague and indefinite.

to Diamond's use of either the statute or the tariff as a basis for discontinuing service. It is not necessary, here, to explore petitioner's arguments in these directions because the telephone company, as stated above, may also act to discontinue service where such service has a tendency to promote illegal gambling, contrary to public policy. *Howard Sports Daily* v. *Weller*, 18 A. 2d 210; *Hamilton* v. *Western Union Telegraph Co.*, D.C. Ohio, 34 F. Supp. 928; *Rubin* v. *Pennsylvania Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128; *Lipton* v. *New York Tel. Co.*, 125 N.Y.S. 2d 251.

The Commission, in reviewing the purported action of the telephone company to discontinue telephone service to Sports Service, decided that Diamond State was justified in concluding that petitioner was using its telephone service to further illegal gambling over a many state area, against the public policy of this and other states. Its decision is now before this Court on appeal.

On appeal to this Court from the Public Service Commission, the cause is determined from the record, which includes a written copy of the evidence and the findings, order and opinion of the Commission. This Court may affirm, modify or revise the order of the Commission, in whole or in part, or may remand the proceedings to the Commission, in whole or in part. 26 Del. Code, Sec. 192(b).[5] The language of Section 192(b) is essentially the

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[5] 26 Del. Code, Sec. 192(b) reads as follows:

"Upon every appeal the cause shall be determined by the Court from the record (which shall include a typewritten copy of the evidence and of the findings and order and opinion, if any, of the Commission) without a jury, and the Court may affirm, modify or revise the order of the Commission, in whole or in part, or may remand the cause to the Commission for rehearing, in whole or in part. The Superior Court is vested with jurisdiction and power to hear and determine all such appeals, and with power to make any and all rules needful or convenient in the premises. Upon the determination of every appeal, a copy of the opinion and order of the Court shall be certified to the Commission."

same as the language contained in the statute governing appeals from orders of the Workmen's Compensation Commission. 19 Del. Code, Sec. 2350(b).[6]

The rule which has been applied in workmen's compensation cases is the rule which governs the present case on appeal, *In the Matter of Application of Diamond State Telephone Company*, Supreme Ct. Del., 107 A. 2d 786, 792-3. In workmen's compensation cases a court never disturbs a finding of the Commission, if there is evidence in the record from which its conclusions could have been fairly and reasonably drawn. *Wright* v. *American Brake Shoe Co.*, 90 A. 2d 681, 684. Thus, the Superior Court sits as a reviewing court only and not as an administrative agency of superior rank. *In the Matter of Application of Diamond State Telephone Company, supra.* The decision of the Commission must stand if there is evidentiary basis for it; cf., *Hill Road Publishing & News Co.* v. *Public Utility Hearing Board*, Supreme Ct. R.I., 190 A. 2d 729, 731; and it is not the job of this Court to re-evaluate pertinent evidence adduced before the Commission.

Plaintiff claims that the hearing before the Commission was in violation of the due process clause of the Federal Constitution for the reason that the evidence adduced at the hearing by the telephone company and the intervenor was not competent evidence upon which a finding should be based. The primary issue this argument presents is

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[6] 19 Del. Code, Sec. 2350(b) reads as follows:

"In case of every appeal to the Superior Court, the cause shall be determined by the Court from the record, which shall include a typewritten copy of the evidence and the finding and award of the Board, without the aid of a jury, and the Court may reverse, affirm, or modify the award of the Board, or remand the cause to the Board for a rehearing. In case any cause shall be remanded to the Board for a rehearing, the procedure and the rights of all parties to such cause shall be the same as in the case of the original hearing before the Board."

whether there was proper evidence before the Commission to justify its action.

The record is lengthy. The testimony alone covers more than 700 pages. The Attorney General admits that much of the testimony presented by the defendants was hearsay and would generally be inadmissible in a court trial. But he contends that hearsay evidence is permissible before the Commission by reason of Sec. 183, Title 26, Delaware Code, which provides that "The Commission shall not be bound by the technical rules of evidence." In any event, he claims that the Commission made its findings on probative evidence, and did not consider in its findings evidence that would normally be inadmissible in a court trial. Thus, he claims that *Geegan* v. *Unemployment Compensation Commission*, 6 Terry 513, 76 A. 2d 116, is inapplicable since in that case the decision of the Unemployment Compensation Commission could not stand because it was based solely and exclusively on hearsay, which is not true here. In *Geegan*, the Court explained that the purpose of the statute which permits a commission to accept evidence not conforming to the legal rules is to free commissions from technical rules in order to prevent the invalidation of administrative orders after such evidence has been received.

Throughout the proceedings below, the Attorney General requested the Commission to accept evidence that would ordinarily be inadmissible in a court trial, relying on the rule of the statute. The Commission, with some reluctance, allowed this procedure, reserving the right to strike it or ignore it at the time of its decision. The statutory rule that commissions are not bound by the same strictness as to the admission of evidence as a court, is a good one. It protects commissions from reversible error for admitting evidence which is not generally admissible in a court trial for the reason that legislators recognize that so often members of commissions are not as conversant with the technical

rules of evidence as are judges. The Commission may, in its discretion, accept any evidence that is offered. There must, however, be a residuum of legal evidence that supports its final determination. See, *U.S. ex rel Dong Wing Ott* v. *Shaughnessy*, D.C. S.D. N.Y., 116 F. Supp. 745. Here, the Commission ignored facts in the record which it considered inadmissible and based its findings on admissible, competent evidence.

A fair reading of all the testimony on which the Commission relied establishes that it was justified in reaching its conclusion that Delaware Sports Service disseminated flash results of horse races primarily for the use of bookmakers.

Intervenor presented testimony of several qualified experts. Each expert agreed that the service rendered by Delaware Sports Service was only of significant importance to a bookmaker or a past poster.[7] Mr. Albert Tollin, the dominating partner of Delaware Sports Service, testified that the present service furnished by Sports Service was of no significant value to bookmakers since it did not contain prices paid, the names of the horses that finished second and third, nor the time of the beginning or finish of a race. Intervenor's experts disagreed with this testimony. First of all, they explained that the information did furnish the time of each race because the telephone operator would announce to its customers that the horses "were running", which indicated the beginning of a race, and any customer could determine the finish of the race when the name of the winner was announced. Even though the name of the winner was unofficial, testimony indicated that a "pitcher" employed by Sports Service had never been wrong. Daniel D. Moynihan, Special Agent with the New

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[7] "Past poster" may be defined as a person who cheats the bookmaker by obtaining the unofficial result of the race and then, with that knowledge, makes a bet with the bookmaker, who does not have the result at the time the bet is placed.

York State Commission of Investigation, noted the importance to a bookmaker of receipt of immediate race results. He explained that it helps a bookmaker to estimate his financial position in regard to the day's betting. Thus, if he should find himself losing heavily on the first race, he may arrange after the first race to layoff with other bookmakers some of the bets he receives on the second race. On the other hand, since the percentages are always in favor of the bookmaker, if he runs fairly well in the first race, he may decide not to lay-off any bets on the second race. Also, by getting immediate information on the winner of a race, he can avoid being past posted, and thus avoid taking a bet from another bookmaker or private bettor on the winner after the race had actually been run.

Furthermore, Moynihan stated that a bookmaker receiving this flash information serves as a convenience for the bettor and consequently stimulates his own business, since a bettor's wagering or betting may be stimulated by his immediate knowledge of the results. If he wins, he frequently finds that he is ahead and therefore he can afford to gamble a little more on the next race. Consequently, Mr. Moynihan explained, flash results have a distinct advantage over radio and newspapers, which do not give immediate results and consequently would not enable the bookmaker to avoid past posting, or assist him with layoffs or stimulation of bets. Also, it enables the unscrupulous bookmaker to accept bets on a loser when he knows the winner. Moynihan further explained that even though the odds were not furnished with the flash results by Sports Service, a bookmaker can nevertheless figure them out roughly if he properly understands his business.

Mr. Frank X. Smith, Chief of the New York City District Attorney's Racket Bureau, made similar remarks when he testified.

Mr. Edward C. McMahon, a qualified agent employed by the Thoroughbred Racing Protective Bureau, primarily en-

gaged in the supervision of the internal security at race tracks, gave testimony like that which he had previously given in a similar case; see *Paterson Publishing Co.* v. *New Jersey Bell Telephone Co., supra,* at p. 601. He said he saw no reason for anyone to want flash information of the type being disseminated by Sports Service except bookmakers and past posters. He stated that some people will place their bets only with bookmakers who will let them know immediately which horse won so that they may determine how much to bet on the next race. Tollin's suggestion that there may be instances where a person wholly unconnected with gambling operations will want immediate information as to the outcome of a race and will be willing to pay a substantial charge for this information was regarded by the Commission as virtually inconceivable. In any event, it considered such instances isolated. See also, *Paterson Publishing Co.* v. *New Jersey Bell Telephone Co., supra,* at p. 602. Mr. McMahon stated that no horse trainer or breeder would be interested in this flash information and that it was unlikely, as Sports Service suggests, that an owner of a horse would use this method to obtain information, especially where the customer seeks more than one result and from different tracks. Normally, a person placing a legal bet at a race track would have no need to ascertain the results of the race by resort to this service. See *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.,* D.C. Ill., 210 F. Supp. 471, 476. In fact, it would be highly unusual for a bettor to even know the unadvertised facility exists or its telephone numbers.

The evidence before the Commission was not limited to the testimony recited. For example, the State also produced a statement signed by Albert Tollin and the late Joseph Tollin before Thomas La Venia, a special investigator for Chesapeake & Potomac Utilities Commission, Washington, D. C., and William J. Wassmer, formerly a State Detective with the Attorney General's office, when they

visited the Tollins in Wilmington on April 14, 1958, wherein the Tollins stated:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors."

Albert Tollin explained that he signed the statement to accommodate his father, who was very ill, even though he felt at the time it was incorrect. It is true that at the time he signed the statement, his father was very ill, and that he may have done it as an accommodation to his father. However, the Commission was warranted in believing that this statement was truthful. In fact, his father, who was admittedly an expert in the business, made statements similar to this before the Kefauver Committee in 1950 and in 1958 before the District of Columbia Public Utilities Commission, which investigated, among other matters, the activities of Delaware Sports Service.

Even though portions of the testimony relating to telephone analyses made by telephone companies in various states was held to be inadmissible by the Commission, some of this testimony was held to be admissible and indicated that bookmakers were using the flash service. In fact, New York witnesses testified that raids were conducted on bookmakers partially as a result of analyses of telephone calls made to Sports Service.

The probative evidence in the record in the instant case clearly shows that under the prevailing test on appeal, the Commission was more than justified in concluding that Sports Service was primarily set up to serve bookmakers by furnishing to them information essential to the conduct of their activities.

Tollin's claim that Sports Service was unfairly charged with the burden of proof is unfounded. The intervenor

assumed the conduct of the hearing for Diamond State Telephone Company and presented all of its witnesses before Sports Service was required to rebut. Although the Attorney General claimed petitioner had the burden of proof, he proceeded throughout the hearing on the assumption that he and Diamond had the burden. And even though the opinion of the Commission expressed the belief that petitioner had the burden, nevertheless, it found this issue moot and decided the case on the assumption that petitioner did not have the burden.[8] Under such circumstances, Sports Service has no right to complain.[9]

Petitioner claims that the controverted question was whether the telephone company had evidence that Sports Service was using its facilities in violation of the law,

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[8] Pertinent language from the Commission's opinion, pp. 15, 16:

"In reviewing the entire record, we have concluded that the intervenor and Diamond State had made a showing that there existed in their minds an honest belief, if not a confirmed conviction, that Petitioner was using its service to further illegal gambling over a wide area, including the State of Delaware.

"At that juncture it was incumbent upon Petitioner to dispel such a belief and to demonstrate to the Commission the legitimate nature of its lucrative business. We have taken this approach in an effort to grant Petitioner the right of rebuttal rather than the burden of proof, even though in doing so we disregard the onus of primary proof which Petitioner bears. We have overlooked procedure in an effort to give Petitioner the benefit since we recognize that it comes before us unwillingly and only at judicial direction.

"It is clear to us, nonetheless, that Petitioner has not only failed to dispel the shadow of illegality that taints its operations, but has taxed the credulity of the Commission with its profession of detached ignorance of the uses being made of the information it disseminates."

[9] Compare *Kelly* v. *Illinois Bell Telephone Co.*, D.C. Ill., 210 F. Supp. 456, 464; *Telephone News System, Inc.* v. *Illinois Bell Telephone Co., D.C. Ill.*, 210 F. Supp. 471, 475; *Rubin* v. *Pa. Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128, with *In re Rosner*, 205 N.Y.S. 2d 476, 477.

as is outlined in the tariff. Petitioner misstates the issue. The Commission did not limit itself to a consideration of the tariff provision. The issue it considered was whether or not petitioner's service was being used for gambling purposes or in furtherance of illegal gambling in violation of public policy. In its opinion, the Commission concluded: "We accordingly determine that Diamond State was justified in concluding that Petitioner was using its telephone service to promote illegal activities."

Petitioner's next argument, that defendants failed to establish the fact of illegality by a preponderance of the evidence, again misstates the issue, the question being whether or not dissemination of news furthered illegal gambling and was against public policy. This question was determined by a preponderance of the evidence. The order of the Commission dismissing Sports Service's petition was supported by competent evidence.

The other arguments advanced by counsel for Sports Service have been considered and do not call for any different conclusion.

Petitioner's appeal denied and dismissed. Decision appealed from affirmed, and the record in the case is ordered sent back to the Public Service Commission.

Opinion

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

No. 1321 Civil Action, 1962

In the Matter of
DELAWARE SPORTS SERVICE, A Partnership

(October 7, 1963)

STIFTEL, *J.*:

Petitioner's motion for reargument, filed pursuant to Superior Court Rule 59(e), and its special prayers as set forth on page 3 of its motion are hereby denied.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

PSC Docket No. 328

In the matter of the petition of
DELAWARE SPORTS SERVICE, a partnership.

Findings and Opinion of the Commission

The present proceedings constitute another chapter in the prolonged contest between law enforcement officials of this State and certain individuals trading as Delaware Sports Service, a partnership, (hereinafter called "Petitioner") over the right of Petitioner to use telephone facilities furnished to it by The Diamond State Telephone Company (hereinafter called "Diamond State"), a public utility subject to the jurisdiction of this Commission.

In an earlier Opinion dated December 14, 1961, we concluded that we had jurisdiction to determine the nature of the use to which Petitioner puts the telephone facilities

furnished to it by Diamond State. At the risk of redundancy, we repeat that the authority of this Commission to conduct a Hearing into Petitioner's operations stems from our statutory duty to supervise the operations of all public utilities in this State to prevent their involvement in the abetting of a criminal activity, in this case, illegal gambling.

To that end, the Commission conducted a lengthy Hearing in which the Attorney General in the role of Intervenor, allied with Diamond State, presented evidence concerning Petitioner's operations, past and present. The Petitioner, in like manner, sought to show the nature of its operation through the testimony of its principal partner, Albert J. Tollin, and the testimony of several persons involved in various news media in this State. Numerous exhibits, including the transcript of the Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (popularly known and hereinafter referred to as the McClellan Committee) held in August and September of 1961, were admitted into evidence and have become part of the voluminous record before the Commission.

At the outset, we deem it appropriate to dispose of the procedural problems posed by the inability of the parties to agree upon either the burden of proceeding or the burden of proof required to sustain their respective positions. Since this matter came before the Commission upon the Complaint of Petitioner to require a utility under our jurisdiction to continue a service whose termination had been threatened, we believe the proceeding to be subject to Rule 14(c) of the Rules of Practice and Procedure of this Commission which provides:

> "(c) In hearings upon applications, complaints or petitions, the applicant, complainant or petitioner, as the case may be, shall open and close. In hearings on investigations involving suspended rates, the respond-

ent or applicant will open and close. In proceedings where evidence is peculiarly within the knowledge or control of another party, the foregoing order of presentation may be verified by the presiding Commissioner."

At the outset of the Hearing, the Attorney General, without conceding the requirement for so doing, assumed the burden of proceeding with the presentation of evidence. The Commission permitted this procedure in the interest of moving the Hearings forward, but we believe the State's reservation to have been well founded. Under Rule 14(c) it would appear that Petitioner must assume the initial burden of proceeding as well as the burden of proving that Diamond State acted without justification in moving to discontinue Petitioner's telephone service. While the issue of proceeding is apparently moot, or at least unimportant, at this juncture, we believe we must evaluate the evidence in terms of whether Petitioner succeeded in showing that Diamond State acted arbitrarily and without (in the words of the Petition filed by Delaware Sports) "rightful cause" in its threatened discontinuance of Petitioner's service. As we view the evidence, we believe that the central issue to be decided is whether Diamond State had reasonable cause to believe that its telephone facilities were being used by a customer for the abetting or promoting of illegal activities. Regardless of whose burden it became to adduce the weight of evidence on the issue, we deem it our duty to evaluate the record before us to determine if there existed a reasonable basis for Diamond State to so conclude. If such a belief exists, it had the right to deny telephone service to Petitioner. Indeed, it is now recognized that the utility is under a duty to refrain from making its services available for criminal purposes. *Andrews* v. *Chesapeake & Potomac Telephone Company*, (D.C.) 83 F. Supp. 966, 968; *Pike* v. *Southern Bell Telephone and Telegraph Company*, 263 Ala. 59, 81 So. 2d, 254; *Hamilton* v. *Western Union Telegraph Co.*, 34 F. Supp. 928.

In assessing the conduct of a utility under its jurisdiction, the Commission, while possessing some judicial prerogatives, does not sit as a court to pass judgment upon the litigants. Rather, the Commission seeks to guide the utility to conformity with legislative norms and to administratively evaluate utility performance in terms of its duty to the public. Thus, should we find that Petitioner, as a telephone customer, labors under arbitrary threat of deprivation of telephone service without justification, we would, of course, respond to its Petition by preventing the threatened interruption. On the other hand, should we conclude that Petitioner is using its extensive telephone facilities to forward and promote an illegal activity, we will, with equal force, uphold the utility's proposed action to prevent its lending its facilities to any illegal act.

At the Hearing, the Attorney General produced witnesses, principally law enforcement officers, who attempted to establish a link between Petitioner and professional gamblers in various States.

Francis X. Smith, Chief of the Rackets Bureau of the District Attorney's Office of Queen's County, New York, testified that he has been acquainted with the transmission by Petitioner of information to and from New York State since 1952. The sending of information from New York took the form of locating employees of Petitioner at various vantage points near the finish lines of race tracks, from which points direct telephone communication was relayed to Petitioner's office in Wilmington.

The sending of racing results to New York by Petitioner was accomplished by long-distance calling to certain Wilmington exchange numbers listed in the name of Delaware Sports Service. Toll analyses submitted by Mr. Smith and other witnesses indicated that many of the individuals initiating such calls did so under fictitious names and used public telephones to secure the results. Both Mr. Smith and a detective on his Staff indicated that the results

furnished by Petitioner were invariably paid for in advance by Western Union Telegrams. In attempting to ascertain the identity of the senders of these telegrams, these officers met with little success since most of the names and addresses provided to Western Union proved to be fictitious. Indeed, in examining thirty-five to forty Western Union messages each year since 1952, Mr. Smith and his Staff were able to locate only one individual whose true identity and address corresponded to the information given to Western Union. The average amount transmitted through Western Union money orders was Thirty Dollars.

An Agent of the New York State Commission of Investigation testified that in the course of raiding various gambling establishments in central New York State he ascertained that telephone numbers from which calls to Petitioner were placed were also the recipients of off-track bets on horse races.

A representative of the Thoroughbred Racing Association Protective Bureau indicated that most race tracks go to great lengths to prevent unauthorized transmission of race results in order not to aid "flash" dissemination of information. The tracks, while providing ample facilities for orthodox news disseminating media, have apparently recognized that the only use for speedy information outside the track is the placing of bets at off-track (hence illegal) betting establishments. Even public telephone facilities are locked during betting hours.

An Investigator for the Attorney General of Florida testified of his contacts with Petitioner in connection with enforcement of Florida's thirty minute delay law. This law prohibits dissemination of racing information from a race track within thirty minutes after the finish of a race. On February 6, 1962, the Investigator sent a money order for Thirty Dollars to Petitioner under the name of Pete Taylor. On February 9, 1962, a call was made to one of Petitioner's telephone numbers, Olympia 6-2501, and the

result of the fifth race at Hialeah, Florida, obtained within a few minutes of the finish of the race. As a matter of fact, the caller waited while the race was being run.

A former State Detective who had worked over a period of several years gathering information about Petitioner's operations testified at length on the telephone analyses he had made of Petitioner's Olympia number. Between March 2 and March 4, 1959, approximately fourteen calls were placed from a telephone located near Camden, Delaware, to Olympia 6-2505, one of Petitioner's phones. The Camden location, known as "Talent Enterprises," was shortly thereafter raided by State Police who found extensive telephone and sound reproducing equipment. State Police were unable to ascribe any legitimate business activity to Talent Enterprises. Criminal charges brought against the operators of Talent Enterprises for illegal dissemination of gambling information (11 Del. Code Sec. 674) were later dismissed because of a defective Information. Two employees of The Diamond State Telephone Company's Dover Office were discharged because of unauthorized services rendered to Talent Enterprises.

During the course of his investigation on April 14, 1958, Detective Wassmer, in the company of an investigator for the Chesapeake and Potomac Telephone Company, visited the home of Joseph Tollin, the deceased father of Albert Tollin, and secured a statement from the older Tollin, also signed by Albert Tollin, in which they stated:

> "Our business is to get fast flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional betters."

Objection was made to the introduction of this statement on the ground that it was the statement of a deceased person who was not a party to the proceedings and who

was ill at the time of its signing. Of course, substantially the same testimony was given by Joseph Tollin before the District of Columbia Public Utilities Commission at about the same period. There Joseph Tollin testified that his service (Delaware Sports) was of definite value to bookmakers because "he (the bookmaker) can get a large amount of business."

At the Hearing, we permitted the introduction of written statements under oath given by Joseph Tollin during his lifetime. We reaffirm our ruling at this time. Based on the evidence in this record and Albert Tollin's own testimony, both in these Hearings and before the McClellan Committee, we have no hesitancy in holding that Joseph Tollin was, until his death in 1960, the controlling personality behind Petitioner. He was its founder, organizer, and he, more than any other person, knew its full purpose and potential as an information disseminating media. He had no illusions about its importance to bookmakers. In all fairness to him, however, we concede that he evidently sincerely believed that what he was doing was legal. There are others who disagree.

Through Mr. Wassmer, the Attorney General offered voluminous correspondence with various police departments throughout the eastern and midwestern United States. These letters were written to supply information on telephone numbers forwarded by Mr. Wassmer. Objection was made by Petitioner to the admissibility of the information contained therein on the ground of hearsay. We believe the objection well founded and do not attach any weight to these letters since the accuracy of the matter contained therein is not subject to verification or cross-examination by Petitioner. In this connection we note that while Section 182 of Title 26, Delaware Code frees the Commission from adherence to the "technical rule of evidence," we must disregard much of the documentary evidence offered by the State dealing with investigations made by police officers who did not testify at the Hearings, because

to admit such evidence would violate basic standards of administrative fairness. Our Superior Court has ruled in *Geegan* v. *Unemployment Compensation Commission,* 6 Terry 513, 76 A2d 116, 117 (1950) that even though administrative tribunals function without the fetters of technical rules of evidence, they are not at liberty to admit vital hearsay evidence against a party who has not been afforded an opportunity to test its authenticity by cross-examination. The Court observed:

> "The purpose of authority to accept evidence not conforming to the legal rules is to free administrative boards or commissions from technical rules in order to prevent the invalidation of administrative orders when such evidence has been received. This purpose, however, does not justify the entry of orders not based upon evidence having probative value. *National Labor Relations Board* v. *Columbian, etc. Co.,* 306 U.S. 292, 59 S. Ct. 501, 83 L. Ed. 660."

We have accepted only that evidence which was within the direct knowledge or experience of the witness, given previously before a competent tribunal under oath or in sworn statements or submitted by stipulation. Thus, we have accepted that portion of Mr. Wassmer's testimony dealing with the Petitioner's subscribers he found to be operating in New Jersey, Pennsylvania and Washington, D. C., which he verified by personal visits to those places. We do not accept similar information received in letters from persons who did not testify under oath before this Commission.

Petitioner, in an effort to demonstrate the legitimacy of its operation, sought to prove that other news disseminating media in Delaware offer sports results and in some instances race results. Of the four radio stations whose representatives testified, only one offers a regular daily program of race results from a variety of tracks. The other stations offer race results only as part of a special

live broadcast or as part of a regular sports information broadcast at hourly or more frequent intervals. The mutuels or pay-off figures of the horses are seldom given by any station except as part of "live" broadcasts.

The one station which does offer periodic daily results enforces a one-half hour lag between the running of the race and the announced result. This station also provides the mutuels for the first three horses. None of the radio stations involved transmits racing information by telephone to any member of the public, nor is any special subscription charge made in connection with the transmission of race results.

The Sports Editor of a local daily newspaper also testified at the request of Petitioner. He indicated that his newspaper publishes complete morning charts with post positions and probable odds, as well as complete charts with pay-off prices of previous day's results. No special charge is made for this service and no information is given by telephone.

The General Manager of Delaware Park also testified as a witness for Petitioner. Most of his testimony was not relevant to the issue of telephone dissemination of race results. He described the facilities available to newspaper and radio media for transmitting race results, but stated emphatically that public telephone transmission of race results was not permitted from within the Delaware Park race track.

The principal witness on behalf of the Petitioner was its General Manager, Albert J. Tollin. Tollin is the active partner and controlling figure in Petitioner's present activities. Tollin testified that his service provides the "unofficial winner only" of a particular race. This information comes to him occasionally from radio transmission close to the site of the race, but more often from his own employees located at or near various tracks.

Petitioner sells its information at the rate of $20 for one result, $30 for two results, and $50 for five results.[1] No single customer is permitted more than five results in one day. The money is sent to Petitioner in advance by Western Union money orders. The customer then calls Petitioner, who checks the "paid" file under the name given and supplies the information if payment has been received. Tollin professed to know none of his customers but has been told that among his clientele he numbers trainers, horse owners and touts. Tollin indicated a willingness to cooperate with law enforcement personnel by discontinuing his service to any person proven to be guilty of bookmaking. Apparently, this offer has not resulted in the discontinuance of service to any customer.[2]

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[1] An accountant for the McClellan Committee testified that Petitioner's average annual gross income for the years 1955 to 1960 was about $262,700. (Transcript page 322)

[2] Albert Tollin stated his position to the McClellan Committee in the following excerpt:

Senator Curtis. So you have never discontinued service to anyone upon learning that they were using it for gambling?

Mr. Tollin. I have never been told that they were using it for gambling purposes. Otherwise, if I were told, it would be discontinued.

Senator Curtis. If this committee at any point in its deliberations would so advise you, would you discontinue it then?

Mr. Tollin. To the certain parties; yes, sir.

Senator Curtis. To the people that we so designated?

Mr. Tollin. If you could conclusively prove it was being used.

Senator Curtis. We would have to prove it? You would not do it if we just told you?

The Chairman. Senator, this morning we gave him the names of a few who were running bookies, whom he was serving, and one particularly that had a record of 44 arrests and 32 convictions during the past years since 1929.

Senator Curtis. Do you remember that testimony?

Mr. Tollin. I do, sir.

Senator Curtis. Do you expect to discontinue that service?

Mr. Tollin. If it is conclusively proven to me that that is one and the same person, it definitely will be discontinued. (Transcript page 338)

On cross-examination, Tollin claimed that he does not know what use is made of his service, and though the names of his customers may be unusual, he has no reason to suspect them of wrong doing.[3] When asked who could use his "flash service", he answered, "People who have sent people down with money to bet at the track." He was unable to name anyone who engaged in that activity.

Petitioner does not possess a customer list; it never corresponds with its customers; has no need to bill them; and future credit on accounts are kept by name and city only.

Tollin conceded that speed is the principal advantage of his service since he is able to give results before newspapers or radio media. Featured racing on television is, of course, faster than his service. When confronted with certain statements made before the McClellan Committee, Tollin professed to "have no knowledge" of the truth of certain of his previous testimony.

During a recess of the Hearing, the Commission, with the consent of all parties, visited Petitioner's establishment at 601 Tatnall Street. Physicially, the building and its interior furnishings are drab and uninviting. The activity of the business focuses on a small second-floor room occupied by two women telephone operators, one at a switchboard receiving customer calls, the other answering calls from Petitioner's informants at various tracks. While the Commission was present, several calls were re-

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[3] To the McClellan Committee, Tollin professed a similar lack of knowledge:

Senator Curtis. He pays quite a little for your service, and you have no idea why he subscribes?

Mr. Tollin. No, sir.

Senator Curtis. Not the slightest?

Mr. Tollin. No, sir.

Senator Mundt. You do not sound like a very enthusiastic salesman for your customers. (Transcript page 337)

ceived requesting information on a race which had not been run. These callers remained on the line while the race was run and were given the result within seconds after the finish of the race. Other calls on the same race were received as much as ten minutes after the race.

We have reviewed the evidence at some length, but have touched upon only its more salient aspects. In reviewing the entire record, we have concluded that the Intervenor and Diamond State had made a showing that there existed in their minds an honest belief, if not a confirmed conviction, that Petitioner was using its service to further illegal gambling over a wide area, including the State of Delaware.

At that juncture it was incumbent upon Petitioner to dispel such a belief and to demonstrate to the Commission the legitimate nature of its lucrative business. We have taken this approach in an effort to grant Petitioner the right of rebuttal rather than the burden of proof, even though in doing so we disregarded the onus of primary proof which Petitioner bears. We have overlooked procedure in an effort to give Petitioner the benefit since we recognize that it comes before us unwillingly and only at judicial direction.

It is clear to us, nonetheless, that Petitioner has not only failed to dispel the shadow of illegality that taints its operations, but has taxed the credulity of the Commission with its profession of detached ignorance of the uses being made of the information it disseminates. Petitioner's claim that it purveys flash results at Twenty Dollars ($20.00) each merely to relieve the bettor's anxiety approaches a studied innocence of modern bookmaking practices in which we cannot join. Speed is the essence of today's off-track betting activities. As one witness indicated, the faster the results, the greater will be the turnover of money waged. Flash results aid the bettor to know earlier the effect of his bets and, if he has been successful, to place that much more money in betting circulation at an

earlier time. The immediate knowledge of results materially assists the bookmaker from being past posted, i.e., from taking bets after the race has been run. Moreover, a bookmaker who subscribes to Petitioner's service may take additional bets after the announced post time instead of closing at the usual time. Through the use of Petitioner's flash service the bookmaker may more quickly estimate his total wins or losses as the betting day progresses and thus "lay off" or replace bets with other bookmakers to offset anticipated losses.

The anonymity of its clientele, while disconcerting to law enforcement agencies, does not concern Petitioner. Indeed, it makes no effort to learn the identity of any of its customers or to compile a customer list. This we do not believe to be a haphazard pattern but an intentional effort to prevent detection of its customers and promote its own intentional lack of knowledge.

The Commission was present and heard Petitioner's employees advise in callers in automation fashion that the "service was not to be used for any illegal purpose." If this admonition were heeded, the occasion for its being spoken might well disappear.

The testimony offered by representatives of radio stations and newspaper media indicates that horse racing information is disseminated in other communication media. But the lack of almost contemporaneous transmission is common to all of these media. Their value for gambling purposes is accordingly reduced. In any event, we lack jurisdiction to regulate such dissemination regardless of its extent. The basic distinction to be made in considering these media, however, is their broad dissemination to the public in general as part of general news disclosure. This was pointed out in a comparable situation in a neighboring State:

> "Thus, reputable newspapers contain racing results and other sporting items which are readily available

> to all members of the public including, incidentally, those who may be engaged in bookmaking or other illicit activities. These racing results are delayed rather than immediate, no charges are imposed beyound the normal price of the newspapers, and the newspapers are not distributed for the primary purpose of furthering gambling or other illegal activities." *Paterson Publishing Co.* v. *New Jersey Bell Tel. Co.*, 21 N. J. 766, 122 A. 2d, 599 (S. Ct. 1956)

In the case of Petitioner, the telephone is the direct and exclusive means for the dissemination of racing information. Its characteristic of instant voice transmission is the principal attribute which makes it valuable to the Petitioner. Telephone communication is here used because it offers speed unobtainable at long and short distances in any other media of communication. Where a telephone system is being used not merely as a facet or adjunct of an illegal activity, but as the direct means for promoting illegal activity, the right of the customer to receive telephone service is forfeited. Based on the evidence in the record before us, we are constrained to find that Petitioner's service under its present arrangement was being used to aid illegal gambling in several States, including but not limited to New York, New Jersey, Maryland, and Delaware. There is no reason to believe that the situation which existed at the time of the Hearing has been modified.

Our findings compel a conclusion, albeit on a smaller scale, similar to that reached by the McClellan Committee which found:

> "A confederation of operators in the eastern portion of this country is supplying, in a telephonic network, fast results of horse races, which are vital to the multi-billion-dollar bookmaking racket."

We wish to emphasize that we are passing judgment upon Petitioner's activities in an administrative and regulatory context—not a criminal one. We are not required to determine whether Petitioner has committed a crime by engaging in the telephonic distribution of information designed to aid illegal gambling. The outcome of a criminal charge involving the use of such telephone is not necessarily controlling. *Rubin* v. *Pennsylvania Public Utility Commission*, 177 A. 2d 128, (1962). The record adequately portrays the information which justified Diamond State in moving to terminate Petitioner's service. Having viewed that evidence and the evidence produced by Petitioner to the contrary, we find the proof clear and convincing. We accordingly determine that Diamond State was justified in concluding that Petitioner was using its telephone service to promote illegal activity.

We will confer with counsel regarding an appropriate Order implementing this decision.

BY THE COMMISSION:

VERNON B. DERRICKSON
Chairman

NUTTER D. MARVEL
Commissioner

JOSEPH C. HUTCHISON, JR.
Commissioner

DATED: September 12, 1962.

Attest:

LAFAYETTE F. TIMMONS
Executive Secretary

SEAL

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

PSC Docket No. 328

In the matter of the Petition of
DELAWARE SPORTS SERVICE, a partnership

Opinion on Reargument

On September 12, 1962, the Commission rendered its Findings and Opinion in the above matter. On September 25, 1962, Delaware Sports Service filed a Petition for "reconsideration and rehearing." Rule 20 (a) of the Rules of Practice of this Commission provides:

> "(a) Application for * * * (3) rehearing or reargument after decision must be made by petition duly verified, within ten days after the date of such closing of testimony, final submission or decision, as the case may be."

The Petition for Rehearing is deficient in two respects: it is not timely, nor is it verified. While we are reluctant to condone Petitioner's failure to observe the Commission's rules, we will, nevertheless, consider the Petition on its merits in order that Petitioner be afforded every opportunity to present its case.

We reject as merely argumentative Petitioner's first ground that our admission of "overwhelming preponderance of improper evidence" has denied it due process of law. Our principal opinion, we believe, fully sets forth the evidence we considered and the reasons for its admissability.

Next, Petitioner lists certain "findings of fact" which, it asserts, were erroneously made by the Commission. We have reviewed the record in the light of Petitioner's itemization of alleged error and find no basis for modifying any of the findings in dispute, save one. Petitioner complains of our conclusion that Tollin professed to have "no knowl-

edge" of the truth of certain of his previous testimony. We will qualify this finding to the effect that Tollin's lack of knowledge primarily concerned his father's sworn testimony before the District of Columbia Public Utilities Commission. Albert Tollin's testimony before us was at variance with that of his father and his own signed statement on one very important point—the use to which bookmakers put Petitioner's service. The disparity between the sworn testimony of those who knew most about Petitioner's service cannot be diminished and was not satisfactorily explained by Petitioner. Our over-all evaluation of Albert Tollin's testimony remains unchanged, however, and we find no basis for changing the result.

We request counsel to submit an appropriate Order forthwith.

BY THE COMMISSION:

VERNON B. DERRICKSON
Chairman

NUTTER D. MARVEL
Commissioner

JOSEPH C. HUTCHISON, JR.
Commissioner

Dated: October 3, 1962.

Attest:

LAFAYETTE F. TIMMONS
Executive Secretary

(SEAL)

BEFORE THE PUBLIC SERVICE COMMISSION OF DELAWARE

Docket No. 328

IN RE DELAWARE SPORTS SERVICE

Findings and Opinion of the Commission

This matter arises from a Petition filed with the Commission by a partnership trading as Delaware Sports Service. The Petition stems from an attempt by The Diamond State Telephone Company (hereinafter "Diamond State") to discontinue certain telephone service which it is presently furnishing to the Petitioner. The Commission is requested to conduct a hearing to determine whether Diamond State has rightful cause to discontinue this service.

Diamond State is a public utility operating a telephone communications system in the State of Delaware. It is subject to the jurisdiction of and regulation by this Commission, and its operations have been actively regulated under the jurisdiction of the Commission since the Commission's inception in 1949. Delaware Sports Service consists of four partners, and its principal place of business is 601 Tatnall Street, Wilmington, Delaware.

Diamond State sent a letter dated November 28, 1960, to Delaware Sports Service (hereinafter sometimes "Delaware Sports"), stating as follows:

> "We have reasonable grounds to believe that the general telephone exchange and toll service which you now receive is being used in the business of disseminating information in furtherance of gambling and for gambling purposes.
>
> "Section 674 of Title 11 of the Delaware Code forbids such operations and penalties are provided for violation of the Section. Section 135 of Title 26 of the Delaware Code authorizes the Public Service Commission, after hearing, to require a public utility to furnish service. In view of these provisions, you are notified

that your telephone service will be terminated on December 15, 1960, unless before that time you have filed a Complaint with the Public Service Commission seeking to have that body determine the nature and lawfulness of your operations and decide whether this company should be required by it to continue to provide telephone service to you for such use."

Following the receipt by Delaware Sports of the aforesaid letter, and on December 14, 1960, Delaware Sports filed its Petition with the Commission, thereby giving rise to the present proceeding.

It will be noted that the letter from Diamond State to Delaware Sports dated November 28, 1960, quoted above, refers to Section 674 of Title 11 of the Delaware Code. At the time the Petition was filed with the Commission, the constitutionality of Section 674 of Title 11 was under attack in the Superior Court of the State of Delaware in a case unrelated to this one. In view of the fact that the Court of Chancery of the State of Delaware had declared Section 675 of Title 11 (a Section closely allied to Section 674), invalid just a few weeks before the Petition was filed with this Commission, we were of the opinion that we should await the determination of constitutionality of Section 674 by the Delaware Superior Court before we became extensively engaged in proceedings in this matter. Obviously, if Section 674 of Title 11 should be held to be unconstitutional, then the purported basis for the threatened action by Diamond State, as set forth in its letter of November 28, 1960, would no longer exist.

Ultimately, the Superior Court of the State of Delaware ruled that Section 674 was constitutional. *State* v. ***Benicky***, Civil Action Nos. 45 and 46, 1959, and 96-101, inclusive, 1960, Kent County.

Thereafter, on June 28, 1961, this Commission entered an Order granting the Attorney General of the State of

Delaware, upon his motion, the right to intervene in this proceeding.

Following the intervention by the Attorney General, by agreement among the parties and the staff of the Commission, it was decided that there should first be posed for the Commission the question of the Commission's jurisdiction over the telephone service being furnished to Delaware Sports by Diamond State. This question arises because Delaware Sports assert that its business is all conducted across State lines and, consequently, constitutes interstate commerce over which this State Commission has no jurisdiction. Delaware Sports takes the position that the telephone system furnished to it by Diamond State is not utilized in telephone calls where both the caller and the received [sic] are located in the State of Delaware. Under these circumstances, argues Delaware Sports, this Commission has no jurisdiction, but rather the jurisdiction lies solely in the Federal Communications Commission.

Diamond State and the Attorney General both actively oppose the legal contention of Delaware Sports in this respect. Indeed, Diamond State and the Attorney General take the position that, even if the business of Delaware Sports is solely in interstate commerce, this Commission still has jurisdiction. Diamond State and the Attorney General concede, only for the purposes of this particular phase of the proceeding, that the business of Delaware Sports is solely in interstate commerce. They make the concession because of their belief in their argument that even if the business of Delaware Sports is limited to interstate commerce, this Commission still has jurisdiction in the premises.

All parties have now submitted Briefs to the Commission on this question. Thus, the specific question facing us at this point is whether or not we have jurisdiction to hear this matter, even though all of the business of Delaware Sports is in interstate commerce and none of it constitutes intrastate commerce within the State of Delaware.

This Commission is not a court of law. It has been described as having both quasi-administrative and quasi-judicial functions. It is a regulatory body created for the general purpose of supervising the intrastate operations of public utilities in the State of Delaware. It has power to refuse to permit new businesses to enter into the intrastate public utility field in Delaware, and it has the power to regulate the operations of those businesses which are already engaged as intrastate public utilities in the State of Delaware.

The questions posed to the Commission in this particular proceeding might be more appropriately raised in the Courts of the State of Delaware, because they involve to a great extent questions of law which should be answered by judges. However, resort to the Delaware Courts has already been had, and it is because of the view of at least one of those Courts, that the present proceeding now exists before this Commission.

A review of the factual history leading up to the present proceeding will help put this matter in a more understandable posture.

The Attorney General of the State of Delaware sent a letter dated October 13, 1959, to Diamond State. That letter read, as follows:

> "For the past several months, as you know, this office has been conducting an investigation of the business and activities of the Delaware Sports Service, 601 Tatnall Street, Wilmington, Delaware. We have reasonable grounds to believe that Delaware Sports Service is engaged in the businses of, and receiving compensation for, the dissemination of information in furtherance of gambling and for gambling purposes.
>
> "For this reason we hereby request that you revoke your contract with the Delaware Sports Service and the individuals in charge thereof, and that you cease and desist from furnishing it any further service.

"So that Delaware Sports Service may seek to test the applicable statutes in the courts, if it so desires, we request that your discontinuance of services not take place until three weeks from the date hereof. In the event the expected test litigation ensues within the three-week period, we shall so advise you so that discontinuance of your services will not occur until disposition of the litigation. If you have any question of any kind or nature whatsoever, please feel free to call on us or to have your local counsel do so."

Following the receipt by Diamond State of the aforesaid letter from the Attorney General, Diamond State wrote a letter of October 15, 1959, to Delaware Sports Service. The Diamond State letter read, as follows:

"We have received a request from the Attorney General of Delaware, dated October 13, of which a copy is annexed, to discontinue your telephone service. The Attorney General reports that he has reasonable grounds to believe that the service is being used in the business of disseminating information in furtherance of gambling and for gambling purposes.

"Under Section 675 of Title 11 of the Delaware Code and under paragraph 20 of Section 1 of the Company's tariff, P. S. C. Del. No. 1 which is on file with the Delaware Public Service Commission, the Company is obliged to revoke its contract and terminate service in view of the letter from the Attorney General referred to above. Therefore, as suggested in the Attorney General's letter, you are notified that your telephone service at 601 Tatnall Street, Wilmington, Delaware, will be terminated on November 3, 1959, which is three weeks from the date of the Attorney General's letter."

Following the receipt by Delaware Sports of the aforesaid letter from Diamond State, Delaware Sports filed an action in the Court of Chancery of the State of Delaware

in and for New Castle County, being Civil Action No. 1208 in said Court. In that action, Delaware Sports requested the Court of Chancery to issue an injunction which would enjoin Diamond State from interfering with or removing the equipment or interfering with the service then being rendered to Delaware Sports by Diamond State. The Court of Chancery was also requested to issue a mandatory injunction compelling Diamond State to maintain the service it was then rendering to Delaware Sports for so long as Delaware Sports should comply with the payment of the tariffs approved by this Commission.

In the Chancery action, all parties moved for summary judgment, and the record in the Court of Chancery consisted of the pleadings and a stipulation which posed certain constitutional issues allegedly raised by the pleadings. The Court of Chancery rendered its Opinion on September 8, 1960. *Tollin* v. *Diamond State Telephone Company*, 1960, 164 A. 2d 254. In that Opinion, the Court of Chancery found that Section 675 of Title 11 was invalid. Section 675 was the only Section of Title 11 which was directly involved in the particular litigation in the Court of Chancery.

The Court of Chancery in its Opinion, however, went much further. It held that if this Commission has jurisdiction over the type of complaint made by the Attorney General concerning the use by Delaware Sports of Diamond State's facilities, then this Commission in the first instance must determine whether or not the telephone service of Delaware Sports may be properly discontinued by Diamond State. The Court of Chancery found that the Courts in Delaware should stand aside until prior resort to the appropriate administrative agency had been sought, and it found that the appropriate administrative agency in this particular proceeding is this Commission. The Court granted the Motion of Delaware Sports for summary judgment to the extent of enjoining Diamond State from ter-

minating the then present telephone service of Delaware Sports prior to a hearing before this Commission on the uses to which Delaware Sports puts such service.

As indicated earlier herein, it was after the Opinion of the Court of Chancery in *Tollin* v. *Diamond State Telephone Company, supra*, that Diamond State sent its letter of November 28, 1960, to Delaware Sports Service. That letter is quoted above. Thereafter, on December 14, 1960, the Petition in the instant proceeding was filed with this Commission.

As indicated earlier, the immediate problem is whether or not this Commission has jurisdiction to hold a hearing and make a determination, if we assume that all of the business of Delaware Sports is in interstate commerce. The Briefs filed by the parties have been directed toward that issue. If the Commission decides that it has jurisdiction under such circumstances, we will proceed to our hearing. If we decide to the contrary, it would be necessary to have a hearing to determine factually whether or not any of the business of Delaware Sports is involved in Delaware intrastate commerce as distinguished from interstate commerce.

The parties have argued strenuously about certain provisions of the Delaware Criminal Code which relate particularly to the use of certain telephone service for the dissemination of gambling information. The parties have also alluded to a tariff provision of Diamond State which has been filed with this Commission and which has never been disapproved nor stricken by this Commission.

As we view this matter, neither the provisions of the Criminal Code of Delaware nor the particular tariff provision which has been cited, in and of themselves, furnish a sufficient basis for the exercise of jurisdiction by us. However, we think there are other reasons why we can and should exercise jurisdiction to hold a hearing and make

a determination upon the Petition filed by Delaware Sports Service.

The provisions of the Criminal Code of Delaware which have been argued are found in the Delaware Code of 1953 as Sections 671 to 677, inclusive, of Title 11. These Sections comprised an Act which was passed by the Delaware General Assembly and became law on January 28, 1952. The Act as originally passed was known as Chapter 493 of Volume 48 Delaware Laws. The title of the Act in the form originally passed was, as follows:

> "An Act to regulate public utilities in the furnishing to others of private wire service and other services for the dissemination or receipt of information in furtherance of gambling; to prohibit the use of same for gambling purposes; to make illegal the dissemination of such information in furtherance of gambling; misdemeanor; penalties; jurisdiction."

When the Act found its way into the Delaware Code of 1953, the foregoing title was omitted. Instead, the Act was prefaced with the following title:

> "Regulation of private wire service for dissemination of gambling information."

It is also interesting to note that the General Assembly, in passing the Act, stated expressly that it related to "general provisions respecting the police." This statement also does not appear in the Act as it was carried over into the Delaware Code of 1953, but the Act is, as indicated earlier, a part of the Criminal Code of Delaware as found in the Code of 1953.

We will not at this point quote specific Sections of the Act. Instead, we are attaching as an Appendix to these Findings and Opinion a complete copy of the Act as it is found in the Delaware Code (but not, however, as it was originally passed). During the course of our discussion

herein, however, we will have occasion to quote from specific Sections of the Act.

The Court of Chancery, in *Tollin* v. *Diamond State Telephone Company, supra,* stated that Sections 671 to 677 of Title 11 "are obviously a hodgepodge of civil and criminal provisions designed to deal summarily with the wire service aspect of large-scale gambling." Our examination of these Sections leads us to no conclusion different from that stated by the Court of Chancery.

Section 676 of Title 11 provides that whoever violates any of the provisions of Sections 671 to 677 shall pay the costs of prosecution and shall be fined not less than $500 nor more than $5,000, or imprisoned not more than 12 months, or both. Interestingly, this provision in the Act as originally passed in 1952 provided that the fine or imprisonment, or both, should apply to "any person *or public utility* who or which violate any provision of the Act." (Emphasis supplied). The codifiers of the 1953 Code omitted specific reference to a "public utility."

Section 677 provides that Sections 671 to 676 shall be deemed to be an exercise of the police power of Delaware for the protection of the public welfare, health, peace, safety and morals of the people of the State.

Manifestly, the above-cited Sections are directed toward criminal sanctions against violators of the various provisions of the Act as passed. It would seem to us that any person who is believed to be violating any of the Sections is subject to prosecution duly initiated by the Attorney General of the State of Delaware and properly carried out in the Courts of Law and in accordance with the rules of procedure and law applicable to criminal prosecutions in the State of Delaware.

In the instant proceeding, all parties agree that Diamond State does not furnish any "private wire" service to Delaware Sports. Section 671 expressly defines a "private

wire'' service as meaning any and all service equipment, facilities, conduits, poles, wires, circuits and systems by means of which service is furnished for communication purposes and which services are contracted for or leased for service between two or more points specifically designated and are not connected to or available for general telephonic exchange or toll service. The Section expressly states that a "private wire" service does not include the usual and customary telephone service by which the subscriber may be connected at each separate call to any other telephone designated by him only through the general telephone exchange system or toll service. There is no question but that Delaware Sports has no such "private wire" service furnished to it by Diamond State.

Consequently, as we understand Sections 671 to 677, inclusive, there can be no question but that Section 672 and 673 have absolutely no application in this particular proceeding. Those two Sections expressly apply only to the proscribed use of the "private wire" service.

With Sections 672 and 673 removed from consideration, we have remaining Sections 674 and 675 as prohibiting certain uses of telephone systems. Section 675 must also be removed from consideration because our Delaware Court of Chancery in the *Tollin* litigation declared it to be invalid on the ground that "it purports to permit the cutting off of telephone service without a hearing and to absolve the telephone company from all liability for damages thereby resulting."

Thus, we actually have remaining only Section 674 as proscribing against certain uses of telephone systems. At this point we should quote Section 674:

> "No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of priv-

ate wire or wires, *or by means of a call service.*" (Emphasis supplied).

That portion of Section 674 which refers to "private wire or wires" obviously can have no application in this proceeding, because Delaware Sports has no "private wire or wires." Consequently, Section 674 can have no application unless Delaware Sports does have what is referred to as a "call service."

Section 671 defines a "call service" as meaning "the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service." All parties in this proceeding have stipulated and agreed that Delaware Sports operates a "call service" only, within the meaning of the term, "call service," as it is defined in Section 671.

Consequently, inasmuch as Section 674 is the only Section in the complete Act which makes any reference to a "call service" in the sense of proscribing against the use of telephone service, it seems clear that Section 674 is the only statute in this particular Act which could have any application in the instant matter. Yet, it seems equally clear that if there is a violation of Section 674, then the sanctions set forth in the Section 676 should be made applicable.

As stated before, this Commission is not a court of law. The effort to bring before this Commission, by whatever means, an alleged violation of Section 674 would appear to be, in some sense, an attempt to do indirectly what cannot or will not be done directly. If there is a violation of Section 674 by Delaware Sports, it would seem that such violation should be prosecuted and punished in accordance with the provisions of Section 676. Indeed, there may well be a question as to whether any other type of relief would be available, inasmuch as the Act itself sets forth the punishment and penalties which may be imposed for violations. As a matter of fact, the Act as originally passed in

1952 contained a section which expressly provided that the Municipal Court of the City of Wilmington and the Courts of Common Pleas shall have jurisdiction over violations of the Act. This section was also omitted by the codifiers of the 1953 Code. However, this section clearly limits jurisdiction to the cited courts.

Sections 671 to 677, inclusive, do not make any reference to the Public Service Commission Act of the State of Delaware. The Public Service Commission Act is found in Title 26, Sections 101 to 193, inclusive. The Public Service Commission Act was enacted in 1949, prior to the enactment of Sections 671 to 677, inclusive, of Title 11.

There are discrepancies between the two Acts. For example, in the Public Service Commission Act, a "public utility" is defined as including every corporation that now operates or hereafter may operate, *within this State,* any telephone or telegraph service, system, plant or equipment, *for public use.* The term, "public utility," is also defined in the Criminal Code as it applies in Sections 671 to 677, inclusive, of Title 11. Section 671 defines "public utility" as meaning "a * * * corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

Obviously, there are differences in the two definitions of "public utility." They may possibly be differences without any real distinction, but nevertheless they are differences. For example, in the Public Service Commission Act, it is "operation" of a service, system, plant or equipment which is important. In Title 11, either "ownership" or "operation" is sufficient. Moreover, the Public Service Commission Act requires that the corporation be operating the service, system, plant or equipment *for public use.* Title 11 does not require ownership or operation *for public use.* It is also noteworthy that the Public Service Commission Act applies only to corporations that operate *within this*

State. Title 11 requires mere ownership or operation *in this State.*

There is nothing in Title 11 or in Title 26 to suggest that this Commission shall be governed by the definition of "public utility" as it appears in Section 671. Indeed, we feel bound by the definition of "public utility" as it is defined in Section 101 of Title 26 of the Delaware Code. This is another reason, in our opinion, why an alleged violation of a criminal statute of the State of Delaware should not, in effect, be prosecuted before this Commission. We operate under one definition of "public utility" and the criminal statute has relation to a different definition of "public utility."

Moreover, there may well be some question as to whether or not Sections 671 to 677, inclusive, of Title 11 comply with Article II, Section 15 of the Constitution of the State of Delaware. That constitutional Article and Section requires that no Bill, except Appropriation Bills, shall embrace more than one subject, which shall be expressed in its title. It is clear that Sections 671 to 677, inclusive, of Title 11, as they appear in the Delaware Code, are titled in such way that there is no indication from the title that a "call service" is involved in the statutes at all. The title, as it is contained in the Delaware Code refers only to a "private wire" service, and that term has a specific meaning as set forth in Section 671.

Of course, it is not within our province to consider or determine questions of constitutionality. We merely point out that there may or may not be some question in this case of the constitutionality of Section 674 insofar as it relates to a "call service." We recognize that the constitutional requirement referred to may have been completely fulfilled by the title to the Act as it was initially passed in 1952.

If this question arose on a charge or complaint filed by the Attorney General of the State of Delaware before

this Commission in which he alleges that Delaware Sports is violating Section 674 of Title 11, we have serious doubts that this Commission would have jurisdiction to hear the complaint, especially if that were the only alleged basis for jurisdiction. This would certainly be true if any effort were made to have this Commission impose penalties such as are provided in Section 676. But we do not understand any party to this proceeding to allege that this Commission has jurisdiction or is being asked to exercise jurisdiction to impose any of the penalties provided by Section 676. Even though that be true, we still do not believe that Section 674 or any of its related Sections in Title 11, in and of themselves, bestow any jurisdiction upon us.

The parties have also referred to paragraph 20 of Section 1 of Diamond State's tariff filed with this Commission. It is known as Tariff No. 1. It is interesting to note that this tariff was referred to in the letter by Diamond State to Delaware Sports dated October 15, 1959. However, following the opinion of the Court of Chancery in *Tollin* v. *Diamond State Telephone Company, supra,* on September 8, 1960, the subsequent letter of November 28, 1960, from Diamond State to Delaware Sports omits any reference whatsoever to the tariff provision. Presumably, Diamond State was concerned about the constitutionality and validity of this particular type of tariff provision. The tariff provision is as follows:

> "20. *Use of service for unlawful purposes:*
>
> 'Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used.' "

It is interesting to note the similarity between this tariff provision and Section 675 of Title 11 which was declared

invalid by the Court of Chancery in *Tollin* v. *Diamond State Telephone Company, supra.* Section 675 of Title 11 provides, as follows:

> "Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service. No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

As indicated previously, the Court of Chancery found Section 675 to be invalid because it purports to permit the telephone company to cut off telephone service without a hearing and it absolves the company from all liability for any damages thereby resulting. If Section 675 is unconstitutional or invalid for such reason, then it is difficult for us to understand why the tariff provisions quoted above would not likewise be invalid or unconstitutional for the same reason. However, we again observe that it is [sic] within our province nor part of our function to determine constitutionality or validity of this type of matter.

The Court of Chancery, in holding Section 675 to be invalid, cited the decision of the United States District Court for the District of Columbia in *Andrews* v. *Chesapeake and Potomac Telephone Co.*, 1949, 83 F. Supp. 966. In the *Andrews* case, there was a tariff provision on file with the regulatory commission, filed by the telephone company, to the effect that telephone service might be discontinued and need not be furnished "if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of the law * * *." The Court, in the *Andrews* case, said:

> "Obviously, if this provision of the tariff is to be literally construed, it is not valid. A public utility

> may not deprive a member of the public of his rights to service merely because it receives a notice from a law enforcement agency that he is using the service for illegal purposes. A public utility may refuse, and, in fact, must refuse, service if, to its knowledge, the service is being used for illegal purposes. This fact must, however, be established. To confer what would amount to judicial power on a law enforcement officer and to exercise such power *ex parte* would be violative of due process of law and would deprive members of the public of their legal rights. A public utility may not do this, and neither may a regulatory administrative body."

The Court in the *Andrews* case stated that under circumstances such as existed there, it was the burden and duty of the telephone company to make its own decision as to whether the evidence available to it was sufficient to justify discontinuance of the customer's service. The Court said that the telephone company acts at its peril. The Court also observed that the telephone company would be subject to an action for damages if it should wrongfully discontinue the telephone service.

If we had only the court's decision in the *Andrews* case to consider, perhaps the way would be clearly pointed out to us; however, there are numerous other cases which seem to conflict, at least, in part, with the holding of the *Andrews* case.

For example, in the case of *Taglianetti* v. *New England Tel. & Tel. Co.*, 1954, 103 A. 2d 67, the Supreme Court of Rhode Island seems to have reached a different conclusion from the District Court in the *Andrews* case. In the *Taglianetti* case, the telephone company had filed with the regulatory body of Rhode Island its general regulations. Among these regulations was one which was titled, "Use of service for unlawful purposes." This particular regulation provided as follows:

> "The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service

> will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law. If the telephone company receives other evidence that such service is being or will be so used, it will either discontinue or deny the service or refer the matter to the appropriate law enforcement agency."

The similarity between the foregoing Rhode Island regulation and the tariff provision of Diamond State is obvious.

With respect to the above-quoted regulation by the Rhode Island utility, the Supreme Court of Rhode Island stated that the regulation was intended to govern the use of the telephones by persons with whom the utility had contracted to provide telephone service. The court held that such regulations are in the nature of conditions attached to the right to the continuance of such service. The Court held that action by the utility to discontinue service did not constitute action by the State of Rhode Island. The Court went on to say, as follows:

> "In our opinion, the fact that the regulations are filed with the Division of Public Utilities and are approved by the Administrator does not transform them into Acts of the State. Such filing and approval are merely incidents of the State's regulatory supervision of respondent as a public utility and are designed to inform the patrons thereof of their rights and obligations in the use of the service offered by respondent to the public."

The Supreme Court of Rhode Island held that the tariff provision was valid and constitutional. It ruled that there is no deprivation of any constitutional or legal right to which a customer is entitled just because he is not guaranteed notice and a hearing. The Supreme Court of Rhode Island referred to the *Andrews* case and held that in such case, there was not any conflicting or different rule. The

Andrews case, said the Supreme Court of Rhode Island, laid down the same rule that it itself was laying down, but the Court in the *Andrews* case further pointed out that where the telephone company acts of its own volition, it must have reasonable grounds for believing that the use of its service is illegal and mere notice of *suspicion* from a law enforcement agency to that effect is not enough. The Supreme Court of Rhode Island said that in the *Andrews* case, the Court held that the utility has a duty to establish the fact of illegality by a preponderance of the evidence but this does not mean that the utility could not act without first notifying the customer of the charge against him and giving him an opportunity to be heard, if the utility has appropriate evidence.

In the case of *Hamilton* v. *Western Union Telegraph Co.*, 1940, 34 F. Supp. 928, the United States District Court for the Northern District of Ohio ruled that a tariff provision was not even necessary to justify a telephone utility in discontinuing service to a customer where the utility is reasonably assured that the customer is using the service for an illegal purpose. The Court said, as follows:

> "If there is justification for the defendant's belief that the information transmitted to the plaintiff over its wires is being used for illegal purpose, a court of equity will not restrain the defendant from discontinuing such service. The tariffs published by the defendant contain a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law. *Even without such provision in the tariffs,* the defendant would not only be authorized, it would be obligated, to discontinue service which contribute to or facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of equity will not restrain the discontinuance of service by a utility if the character of the use of service is

such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character."

Manifestly, the rulings of the various courts on this question do not present a straight and clear path. We have difficulty aligning the *Andrews* decision with the *Taglianetti* decision so that both are perfectly compatible. The Supreme Court of Rhode Island apparently had no such difficulty, but there again the matter was being considered by a court of law and not by a regulatory commission. If the *Hamilton* decision is to have any weight with us, it would appear that no tariff provision is at all necessary in order for the utility to discontinue service. Under those circumstances, it would appear that the utility acts at its peril and must make certain, if it is to be protected, that it has sufficient evidence to justify an honest doubt as to the legality of the use to which its customer is putting its service and facilities.

Paragraph 20 of the Tariff No. 1 of Diamond State as filed with this Commission and as quoted above, does not provide that there shall be any notice given to the customer of Diamond State before his service is discontinued, nor does it provide that any hearing will be afforded to him prior to the discontinuance of any service. It does provide that Diamond State shall not furnish any service if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law. This is the very type of provision which was struck down by the Court in the *Andrews* case. On the other hand, it seems not to have bothered the Court in the *Taglianetti* case. Finally, the existence or nonexistence of any such tariff provision seems to have been unimportant in the view of the Court in the *Hamilton* case. Certainly, it should not fall upon this Commission to ferret out the variations in the rulings and the fine refinements between the different views of the various courts.

We have determined that we have jurisdiction to act in this particular proceeding. We intend to schedule a hearing and go into the evidence to the extent our statutory authority permits us. However, the grounds for our determination are different from those which have been presented to us and argued to us by the parties involved. We shall now direct our attention to these grounds.

We have first discussed the general confusion in the area as we understand it, and we believe that discussion to have been necessary in order that the basis of our ruling be clearly understood.

We are not intending to exercise any jurisdiction by reason of the existence of Section 671 to 677, inclusive, of Title 11 of the Delaware Code. We do not think it appropriate for us to base any jurisdiction or power upon the existence of any of said Sections. We think we have pointed out the reasons earlier herein.

Likewise, we are not basing our exercise of jurisdiction and power to hold a hearing in this matter and to make a determination, upon the existence of paragraph 20 of the Tariff filed by Diamond State with us. Although we do not think it is within our province to declare such tariff unconstitutional or invalid on constitutional grounds, we cannot ignore the fact that at least one court has ruled that a similar provision was indeed invalid, nor can we ignore the fact than an almost identical provision found in the form of Section 675 of Title 11 of the Delaware Code has been declared invalid by our Court of Chancery, relying upon the *Andrews* decision. Consequently, we are not basing our exercise of jurisdiction upon the existence of this tariff provision.

The parties have argued the question of whether or not the exclusively interstate character of the business of Delaware Sports removes its operations from our jurisdiction. Diamond State and the Attorney General have argued vigorously that Sections 671 to 677, inclusive, of Title 11

are clearly exercises of the police power of the State and are made expressly so by Section 677. In this they are correct. They further argue that even though a business is engaged solely in interstate commerce, the State may interfere with the operation of the business in those cases where the interference is part of the exercise of the police power of the State. Consquently, they argue that this Commission has jurisdiction to determine whether or not Diamond State can rightfully discontinue telephone service to Delaware Sports, because the matter involves an exercise of police power by reason of the existence of Sections 671 to 677, inclusive. This argument, it seems to us, is fallacious.

In the first place, that portion of the statutes which Diamond State and the Attorney General would presumably rely upon is Section 675. It is almost identical to the tariff provision filed by Diamond State with us. But Section 675 has been held to be invalid by our Court of Chancery.

In the second place, the only remaining Section in the Criminal Code which could have any application to this proceeding is Section 674. We do not understand how we can escape the fact that Section 676 clearly expresses the types of penalties which shall be imposed for violations of Section 674. None of those penalties involve the type of proceeding which is before us in this case, nor does Section 676 bestow upon this Commission any jurisdiction to impose such penalties.

Moreover, there is nothing in Sections 671 to 677, inclusive, which confers any jurisdiction upon this Commission, nor is there any statutory relationship expressed between the Public Service Commission Act as found in Title 26 and Section 671 to 677, inclusive, of Title 11. We have previously pointed out the differences in the definition of a "public utility" as found in the two statutory enactments. We must act under the definition of a public utility as

contained in Title 26. We think it is clear that there was no legislative intent that our Commission would have any jurisdiction to act under Sections 671 to 677, inclusive, of Title 11. Otherwise, it would seem that the definition of "public utility" would be identical in each enactment.

Thus, we do not believe that Sections 671 to 677, inclusive, of Title 11 form any jurisdictional basis in this proceeding whatsoever. We shall ignore them.

Delaware Sports has argued vigorously that this Commisison does not have any jurisdiction to hear this matter because the business of Delaware Sports is solely in interstate commerce and under such circumstances, the sole jurisdiction to determine this type of matter lies in the Federal Communications Commission. This may be somewhat of an unusual position for Delaware Sports to take, because it is the Petitioner in this matter and has requested this Commission to hold a Hearing. However, it acted in a sense under a form of duress, because Diamond State was about to discontinue its service unless it took action with this Commission. If Delaware Sports were so firm in its conviction about the exclusive jurisdiction of the Federal Communications Commission, we know of no reason why it could not have petitioned that Commission instead of us.

We believe that Delaware Sports misplaces its argument, just as we think that Diamond State and the Attorney General have presented their argument in legal framework that does not exist.

We do not understand how the interstate or intrastate character of a utility customer's business will affect our jurisdiction. We do not have any jurisdiction over the business of any customer of a utility. Our jurisdiction and power lies within the framework of the utility's operations itself. We have authority to regulate and supervise utilities, not their customers. If our jurisdiction and power were over the customers of utilities, presumably we would

have to examine and regulate the operations of every customer of the utility.

If we were to supervise and regulate the operation of the business of Delaware Sports, clearly we would seem to have jurisdiction to do so only if Delaware Sports were engaged in intrastate operations, and then only to the extent that it was so engaged. However, we do not conceive our jurisdictional power to be so founded. By law (Title 26, Delaware Code, Section 121), we are given "general supervision and regulation of all public utilities and also over their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title."

Manifestly, the above-quoted jurisdictional statute gives us power to regulate and supervise the utilities themselves but not their customers. Section 122 of Title 26, for example, provides that we shall have no power or jurisdiction to supervise or regulate any public utility or the property, property rights, equipment, facilities or franchises of any public utility that is owned by a municipality. Certainly, in the instant case, for example, the Water Department of the City of Wilmington undoubtedly serves water to Delaware Sports. It can provide such service under such circumstances as it sees fit, and for such rates and charges as it sees fit, insofar as we are concerned, and we have absolutely no jurisdiction or power to do anything about it. Our jurisdiction and power is over utilities and not over customers of utilities.

The Public Service Commission Act also gives us power (Title 26, Delaware Code, Section 124) to investigate, either upon our own initiative or upon complaint in writing, *any matter* concerning *any public utility*. We must keep in mind the definition of "public utility" as it is used in the Public Service Commission Act and as we refer to it earlier herein.

Section 134, of Title 26 provides that we may, after a Hearing and upon notice, enter a written Order which will require every public utility to comply with the laws of the State of Delaware and to conform to the duties imposed upon it by such laws or by the provisions of the utility's own charter. We can conceive that if Section 675 of Title 11 were valid, an appropriate Petition might have been filed with us for the purpose of requiring Diamond State to comply with Section 675. Such a proceeding would have clearly presented to us a matter over which we would have jurisdiction without any question. However, Section 675, as pointed out above, has been held by our Court of Chancery to be invalid.

The foregoing Sections of the Public Service Commission Act clearly seem to us to justify our view that our power and jurisdiction lies only over public utilities and not over their customers. Consequently, we have difficulty in understanding how the interstate or intrastate nature of the business of a customer of a utility can be important to us on the question of our jurisdiction over the operations of a utility. In short, the important factor, as we see it, is the intertsate or intrastate character or nature of the operations of the public utility itself. For example, there is an Airport Shuttle Service operating between the Hotel duPont in Wilmington, Delaware and the International Airport in Philadelphia, Pennsylvania. No one passenger is picked up in Delaware and discharged in Delaware by that service. No passenger who embarks in one State departs from the service to the same State. Such service is solely interstate in its operation and consequently, although it is a utility, we have no jurisdiction or power over it. It does own equipment and facilities *in Delaware,* and if it were a telephone utility, it therefore would fall under the definition of a "public utility" as contained in Section 671 of Title 11. Yet, it still would not be subject to our jurisdiction.

Likewise, if Diamond State furnished a "private wire" service to Delaware Sports, and one specified point was in Delaware, and the other specified point was outside Delaware, there might be some question as to our jurisdiction over that particular public utility service.

Section 101 of Title 26 provides that a "public utility" over which we have jurisdiction and power includes a corporation that operates a telephone service or system *within Delaware for public use.* It is clear that Diamond State does operate a telephone service and system *within Delaware for public use.* Diamond State has been under active regulation and supervision by this Commission from the inception of the Commission in 1949. Our supervision and regulation has extended over almost all of the operations of Diamond State, to the extent permitted by the Public Service Commission Act, and without regard to the fact that its customers utilize its services for telephone calls going across state lines.

There are undoubtedly hundreds of customers of Diamond State who utilize their telephone service primarily or perhaps exclusively in interstate commerce. This does not, in our view, deprive us of jurisdiction over the operations, facilities, services, property and property rights of Diamond State. Diamond State still operates a telephone service or system *within Delaware for public use.* That being so, we clearly have jurisdiction to supervise and regulate the property, property rights, equipment, facilities and franchises of Diamond State for the purpose of carrying out the provisions of Title 26 and we may investigate, either upon our own initiative or upon complaint in writing, *any matter* concerning Diamond State. Moreover, we have jurisdiction and power, after a Hearing and upon notice, to enter a written Order which will require Diamond State to comply with the laws of the State of Delaware and to conform to any duties imposed upon Diamond State by such laws. We also have power and jurisdiction, by Section 135

of Title 26, after a Hearing and upon notice, to enter an Order in writing requiring Diamond State to furnish safe, adequate and proper service to its customers, or to any of them.

We recognize that Article II, Section 17 of the Constitution of the State of Delaware provides, among other things, that "The sale of Lottery Tickets, pool selling and *all other forms of gambling* are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizers in connection therewith." (Emphasis supplied). It seems clear that gambling is against the public policy of the State as set forth in the Constitution.

The Delaware General Assembly has also clearly enacted legislation evidencing that gambling is against the public policy of the State of Delaware. See *Sections 661 et seq., Title 11, Delaware Code.*

We have no desire to have any public utility subject to our jurisdiction involved in a conscious violation of any law of the State of Delaware or in a conscious violation of the strong public policy of the State of Delaware. Nor do we have any desire to have any public utility subject to our jurisdiction involved knowingly in aiding and abetting a violation of the law of the State of Delaware or a violation of the strong public policy of the State of Delaware. We agree with the Court in the *Hamilton* case, *supra,* that the service which a person has a right to demand from a public utility is service which must be lawful in character. On the other hand, the public in the State of Delaware is entitled to the services offered and furnished by public utilities unless there is adequate and competent proof that such services are being utilized in violation of the law or of the strong public policy of the State. We likewise feel constrained to indicate sympathy with the holding of the Court in the *Andrews* case, *supra,* to the effect that a mere notice from a law enforcement agency stating that it has

grounds to believe that a customer is utilizing a public utility service for violation of the law, in and of itself is not sufficient, adequate or competent proof justifying a discontinuance of this service by the public utility.

Obviously, this matter involves serious consequences. A citizen may be deprived of public utility services which are generally available to all citizens, and the public utility may be subject to suits for damages. It requires a thorough investigation of all of the pertinent facts and a serious review of the place of this Commission in acting upon such facts. We cannot permit this Commission to become a forum for the trial of criminal cases in an indirect manner, nor for the creation of foundations for civil damage actions. On the other hand, our responsibilities with respect to the operation of public utilities and their facilities in the State of Delaware require us to be seriously concerned with any illegal uses to which their facilities are put.

This type of matter can have untold ramifications. For example, if we assume that ultimately we advise Diamond State that it can or should discontinue service to Delaware Sports, would our advice be equally applicable to the electric utility which is furnishing electricity to Delaware Sports? If we had jurisdiction to regulate the water utility which is furnishing water to Delaware Sports, would our advice be likewise applicable to it? Do we act only with respect to the particular public utility which is furnishing a particular facility that is *directly* used in an alleged violation of the law, or do we act also with respect to other public utilities who furnish services that are *not directly* used in the alleged violation of the law but are important or necessary to the over-all operations of the customer? These are matters upon which we are not prepared to express any opinion, even a tentative one.

Our general jurisdiction as contained in Title 26, Delaware Code, is, in our opinion, sufficiently broad to justify

our holding a hearing and making a determination in this matter. Diamond State may now have been put upon sufficient notice by the letter from the Attorney General so that it may be seriously concerned as to whether or not it is aiding and abetting an alleged violation of one of the criminal laws of the State of Delaware. If this be the situation, then we clearly have legislative justification for proceeding to a hearing and determination in this matter.

There is also involved in the proceeding the question of the type of service to be rendered by Diamond State to Delaware Sports. Diamond State seeks to discontinue its services. Under these circumstances, we have legislative justification to investigate, hold a hearing and make a determination.

Moreover, we think our general concern with the overall supervision and regulation of public utilities in Delaware justifies our taking jurisdiction to hold a hearing and make a determination. We want to emphasize that in so doing, we do not construe ourselves as engaging in any exercise of the police power of the State. As we understand the law, the question of a valid or invalid exercise of police power only arises from legislative enactments which purport to be enacted in the exercise of such power. In this case, we are taking administrative action and although we are a State agency or commission, we do not mean to equate our action with a legislative exercise of police power.

We are directing the parties to arrange for a Hearing in this matter. At the Hearing, we will expect to receive evidence directed toward the use and utilization to which Delaware Sports is putting the telephone facilities and service furnished to it by Diamond State. If the evidence should justify our so holding, we think we have the power either to direct Diamond State to discontinue service to Delaware Sports or at least not to interfere with the unilateral discontinuance of such service by Diamond State.

We are not prepared at this time to lay down any ground rules as to the exact procedure which will be followed at the Hearing. Nor can we at this time determine the extent of the proof which must be adduced in order for use to take action which would be detrimental to the cause of Delaware Sports. These are matters which must be resolve during the course of the Hearing or by legal arguments at the conclusion of the Hearing.

An Order in conformity with these Findings and Opinion will be entered.

BY THE COMMISSION

/s/ VERNON B. DERRICKSON
Chairman

/s/ NUTTER D. MARVEL
Commissioner

/s/ GEORGE T. BARNHILL, JR.
Commissioner

DATED: December 14, 1961

Attest:

/s/ EDEN F. JONES
Acting Executive Secretary

Hearsay Evidence

BEFORE THE PUBLC SERVICE COMMISSION OF THE STATE OF DELAWARE

Docket No. 328

In the matter of the petition of DELAWARE SPORTS SERVICE, a partnership.

• • •

(Tr. 26) "Q. And did you find that he had sent such a Western Union money order to Delaware Sports Service?

"A. In my questioning of Mr. Accetta—

"MR. WISE: Now, Mr. Chairman, I recognize the rules of this body, but I must object that obviously this answer is going to be hearsay.

• • •

(Tr. 27) "THE CHAIRMAN: I want to note his objection for the record, and we will let the testimony come in after the objection has been noted."

• • •

(Tr. 68) "Q. Now, you have been in the courtroom and you have heard Mr. Smith testify, is that correct?

"A. Yes, sir.

"Q. And you have heard him testify as to these annual Western Union money orders analyses, and investigations thereof?

"A. Yes, sir.

"Q. Now, during the course of your employment have you recently had occasion to make such investigation?

(Tr. 69) "A. Yes, sir.

• • •

"A. I have checked about fifteen names, and about 40 or forty-some odd addresses."

• • •

"Q. Can you give the Commission just one example? For example, did you have the name, Jim Crawford?

"A. Yes, sir.

(Tr. 70) "Q. What was the story on him?

"A. In this particular instance there were about six or eight messages giving four addresses.

• • •

"MR. WISE: May the Commission please, may the record show that I object to all of this on the ground it is hearsay?"

• • •

(Tr. 89) "Prior to the opening of Hialeah Race Track January 17th, I received information from a confidential informant in Dade County that a custom-built receiver was being moved into an area in close proximity to Hialeah Race Track, within a quarter of a mile.

"MR. WISE: If the Commission please, I do not want to continually interrupt, but may the record show that this testimony is clearly hearsay, and we object?

"THE CHAIRMAN: Let it be so noted. The objection is noted."

• • •

(Tr. 117) "Q. And did you have occasion to make a toll analysis of phone calls from New York to Delaware Sports Service?

"A. Yes, sir. We had a number of toll anaylses made, which indicated that various telephones known to us to be in use for bookmaking purposes were calling Delaware Sports Service—

"MR. WISE: I object. This is obviously hearsay, Mr." (Tr. 118) Chairman.

"THE CHAIRMAN: Unless the witness knows of his own personal knowledge and can say he knows of his own knowledge that it was for bookmaking purposes, I would have that answer stricken.

• • •

"THE CHAIRMAN: I understand what he found. But does he himself know of his own knowledge? He is making a

charge of bookmaking here in this particular instance, and does he know of his own knowledge that is what it was being used for?"

(Tr. 234) "Q. And can you identify this photostat as a photostat of the document which you believe you saw on that date?

"A. Yes, I have a copy of this document in my file.

"MR. BOVE: I offer it in evidence.

"MR. WISE: I object to it first on the ground that it is hearsay; and secondly, that I don't see how the Commission can decipher what it is intending to say."

• • •

(Tr. 235) "THE CHAIRMAN: We are trying to find out the purpose of the document.

"MR. BOVE: It shows the telephone calls between the key places."

• • •

(Tr. 236) "MR. BOVE: All right, let's mark it for identification, Intervenor's Exhibit No. 10."

• • •

(Tr. 255) "MR. BOVE: I now offer Intervenor's Exhibit No. 10 into evidence.

"MR. WISE: It is subject to the same objection. We will stipulate that OLYMPIA 6-2505, 6-1120, and 6-2020 are numbers that belong to Delaware Sports Service.

"THE CHAIRMAN: Let the Exhibit No. 10 introduced for Identification be now marked Exhibit No. 10 of the Intervenor, subject to the objection that has been made by Mr. Wise."

• • •

(Tr. 242) "She stated that on these calls racing information was disseminated over these lines.

"MR. WISE: Now, I object. If Mr. Bove wants to prove what this woman said, Mr. Chairman, why doesn't he bring her here?

"MR. BOVE: I agree it is hearsay, sir, and so is the entire McClellan Committee report, except that part which related to Albert Tollin.

"THE CHAIRMAN: We will note Mr. Wise's objection, and we will let the evidence come in for what it is worth."

• • •

(Tr. 266) "Investigation by the police up there disclosed that it was a direct—they were holding a direct line to Delaware Sports Service in Wilmington—

"MR. WISE: I object. This is purely hearsay, telling us what the investigation of the police of the State of New York was.

"MR. BOVE: It is hearsay, but I ask it be admitted, under—

"THE CHAIRMAN: Let the objection be noted, and the testimony come in for what it is worth."

• • •

(Tr. 275) "A. If I may, with the State of Indiana I sent to the Indiana State Police on April 17, 1959, a list of telephone numbers comprising two numbers actually in the City of Indianapolis, Indiana. Those numbers were Mel. 60508, and Mel. 69041. I assumed that was Melrose, as indicated in the return reply.

"In the return reply from the Indiana State—"

(Tr. 276) "MR. WISE: I object. This is clearly hearsay of the worst type. He is now going to tell us what somebody else told him somebody else found out."

• • •

"THE CHAIRMAN: We are noting Mr. Wise's objection, and we will study it very carefully as to this particular testimony, but we will let the testimony come in for what it is worth."

(Tr. 279) "However, in the other two instances they furnished me the information that the subscriber on telephone numbers—

"MR. WISE: The Commission will note my same objection to this testimony.

"MR. CHAIRMAN: Let the objection by Mr. Wise be noted."

• • •

(Tr. 300) "As a result of a toll analysis that they checked among the telephone numbers included was one Frank—

"MR. WISE: Gentlemen, I hate to object, but, for heaven's

sake, we had a district attorney from New York here to testify in person. Why have hearsay evidence?

• • •

"THE CHAIRMAN: I am going to note your objection, Mr. Wise."

• • •

(Tr. 310) "Q. All right, as a result of furnishing the New Jersey State Police numbers, and southern New Jersey, what happened, if you know, and tell us the basis of your knowledge?

"A. I was told by Major Stockburger that as a result of—

"MR. WISE: Mr. Chairman, just so the record will show it, I object to all of this testimony on two specific grounds: (1) that it is a violation of the Delaware Law for him to have done what he did do; that he did not have an order from a court authorizing him to disclose any of this information; (2) that what he is saying is the rankest kind of hearsay.

"THE CHAIRMAN: I note your objection, Mr. Wise."

• • •

(Tr. 318) "Q. Who made the telephone analysis in upper New York State?

"A. I believe it was Lieut. Lombard in that section, and through Inspector Quinn's office.

"MR. WISE: Mr. Chairman, I have the same objection as I did to all of this testimony. It is purely hearsay.

"THE CHAIRMAN: Let the objection be noted and let the document be entered as Intervenor's Exhibit No. 18."

• • •

(Tr. 322) "Q. And then he was picked up again in the raid which

(Tr. 323) "Moynihan described and you described, in October '59, is that right?

"A. I could check that in a second, sir. I believe so.

"MR. BOVE: I offer this in evidence, sir.

"THE CHAIRMAN: Let the document be entered as Intervenor's Exhibit No. 19.

"MR. WISE: With the same objection, Mr. Chairman.

"THE CHAIRMAN: Note Mr. Wise's same objection to the introduction of the exhibit.

(Copy of 5-page telephone analysis of subscriber East Side Bakery Shop was marked Intervenor's Exhibit No. 19 and received in evidence.)"

• • •

(Tr. 328) "Q. Mr. Wassmer, I direct your attention to a date of October 27, 1959, and ask you if you have with you a memorandum which you wrote on that date concerning the New York raids which you have described and which Agent Moynihan described?"

• • •

"I do understand Mr. Wise will make the same objection (Tr. 329) "that it is hearsay on the basis that this comes from other police officials who are not here.

"MR. WISE: That is right.

"THE CHAIRMAN: Let the document be entered as Intervenor's Exhibit No. 22, noting Mr. Wise's objection."

• • •

(Tr. 330) "Q. I hand you this set of seven photostats, and ask you if they appear to be copies of the Intelligence Report concerning which I have just asked you some questions?"

• • •

"MR. WISE: May the record show I have the same objection to this, Mr. Chairman?

"THE CHAIRMAN: Let the document be entered as Intervenor's Exhibit 23, and note Mr. Wise's same objection to the admissibility of it."

• • •

(Tr. 361) "THE WITNESS: As a result of those notes I requested from New York a copy of the record of Nemo and of Joyce Ruth Smith, which is contained in the exhibit you now have, sir."

• • •

"MR. WISE: Same objection.

• • •

"THE CHAIRMAN: Let the document be entered as Intervenor's Exhibit No. 24, and note the same objection by Mr. Wise to the admissability of the document."

• • •

(Tr. 362) "A. This is one of the communications with reference to Peter Anthony Tubiolo under the supervision of Sgt. Lombard. This brings out the connection of Tubiolo with the East Avenue News, with Michael Blandino, and the record of Michael Blandino, and a telephone analysis of the telephone number which I have given before, I believe, EMERSON 7-8912, Peter Tubiolo, East Avenue News Center, which indicates telephone calls to the Delaware Sports Service."

(Tr. 363) "Q. And these individuals were involved in the New York raids that you previously mentioned, in October, 1959?

"A. Yes, sir.

"MR. BOVE: I offer it as one exhibit.

"THE CHAIRMAN: Let the document be so entered as Intervenor's Exhibit No. 25.

"MR. WISE: I make the same objection.

"THE CHAIRMAN: And note Mr. Wise's same objection."

• • •

(Tr. 364) "Q. I hand you five photostats and ask you if you can identify those?

"A. Yes, sir. This is the letter to the postal inspector, and this is the previous letter to New York headquarters, requesting the record on Kenneth Hanna.

"MR. BOVE: All right, I offer them as one exhibit.

"THE CHAIRMAN: Let the documents be entered as Intervenor's Exhibit No. 26, and note Mr. Wise's same objection."

• • •

(Tr. 365) "MR. WALSH: I assume, Mr. Bove, this completes the documentary evidence you are producing through this witness.

"MR. BOVE: Yes, sir.

"MR. WALSH: Gentlemen, we have Intervenor's Exhibits 2 through 26 which are documents introduced through Mr. Wassmer. Some of this consists of correspondence to Mr. Wassmer. Other correspondence emanated from the New York State Troopers Bureau of Criminal Intelligence, and consists of inter-departmental reports and toll analyses." (Tr. 366) "Mr. Wise, so the record may be clear, would you state your specific objections to all of these exhibits, so that we may have the issue sharply in focus here on admissability?

"MR. WISE: My first objection is * * * *"

* * *

"Thirdly, as to a great many of the records that have been introduced, most of the records that have been introduced, there are conclusions drawn by Mr. Wassmer included in the records which are predicated upon information which he says he got somewhere else. So they are clearly hearsay."

Irrelevant Evidence

(Tr. 10) "I have stills of the movies that were taken by the New York City Police Department of the defendant Jacob Pollack. This, as I say, was in 1952.

"MR. BOVE: I offer nine of the still pictures. I understand Mr. Wise has an objection.

"MR. WISE: Mr. Chairman, yes, I have. I do not see how these are going to be helpful to the Commission at all in arriving at its decision."

* * *

(Tr. 11) "THE CHAIRMAN: Under Rule 183, Mr. Wise, noting your objection, the pictures will be allowed for what they are worth to the Commission."

• • •

(Tr. 16) "MR. WISE: Your Honor, I don't know what the purpose of this record of Frank Sorrentino is. There is no indication that he is an employee or an associate of Delaware Sports Service.

"THE CHAIRMAN: What is the purpose of it?

"MR. BOVE: As Mr. Wise well knows, sir, in another proceeding which Mr. Wise attended and I did not, it was shown"

(Tr. 17) "that Frank Sorrentino received the information, and I intend to show that during this proceeding at a later stage.

"Therefore, I ask it be admitted now subject to my connecting it as to relevance."

• • •

(Tr. 18) "MR. WISE: I object.

"THE CHAIRMAN: Under the rules of the Commission, Mr. Bove, we will disallow the exhibit until it may be connected with this hearing."

• • •

(Tr. 303) "MR. WISE: I object.

• • •

"THE CHAIRMAN: Let the exhibit be entered as Intervenor's Exhibit No. 3, and note Mr. Wise's objection."

• • •

(Tr. 162) "MR. WISE: The testimony of Joseph Tollin, Exhibit C attached to the stipulation."

• • •

(Tr. 166) "THE CHAIRMAN: Now, Mr. Wise, as I understand it, you are only objecting to parts of Mr. Tollin's testimony at this time."

• • •

"MR. WISE: Well, as I understand by my letter, I have said that we agree it correctly describes the manner in which"

(Tr. 167) "the service is rendered by Delaware Sports Service, but as to the remainder of it, as to what the people use it for, we object to that as not being relevant."

• • •

(Tr. 228) "MR. BOVE: May it please the Commission, there has been some reference in the examination of witnesses with regard to the Florida statute prohibiting the transmission of racing information for gambling purposes, and I have had photostats made of that particular part of the Florida Code, section 550.35, and offer the photostat as a part of this record.

"Is there any objection Mr. Wise?

"MR. WISE: Yes, I object to it. I do not see that it is relevant to this hearing what Florida is doing.

"THE CHAIRMAN: The Commission will let it come in as"

(Tr. 229) "Intervenor's Exhibit No. 8, subject to the objection by Mr. Wise."

• • •

(Tr. 238) "Q. I show you a photostat and ask you if you can identify that as the drawing which Sgt. VanSant made under your supervision and direction?

"A. This is the drawing of the Talent Enterprises, yes, sir.

"Q. And to the best of your knowledge does this truly represent the interior of that place as you found it?

"A. Yes."

• • •

"MR. WISE: I object unless Mr. Bove is going to show some connection between Delaware Sports Service and this enterprise.

"THE CHAIRMAN: I think that is a fair objection, and I think unless you can tie it in with Delaware Sports Service"

(Tr. 239) "we can only mark it for identification, until you do tie it in."

• • •

"THE CHAIRMAN: Let it be so marked as Intervenor's Exhibit for Identification only, No. 12."

• • •

(Tr. 259) "MR. WISE: Same objection.

"THE CHAIRMAN: Let it be marked in the record as Intervenor's Exhibit No. 12, noting Mr. Wise's objection."

• • •

(Tr. 260) "Q. Mr. Wassmer, when you entered this place of Talent Enterprises what did you see?"

• • •

(Tr. 262) "Q. Is this a photostat copy of the slip of paper which you found in this place?"

• • •

"Q. Do you see a James Spring on there?

"A. Yes, I do. 'Jim S.,' James Spring, who is known to be a bookmaker in the City of Wilmington.

"MR. BOVE: I am going to offer into evidence the slip"

(Tr. 263) "to which Sgt. Bullen and Detective Wassmer have referred.

"MR. WISE: I object to it until there is some connection shown between it and Delaware Sports Service.

THE CHAIRMAN: Note Mr. Wise's objection and let it be marked as Intervenor's Exhibit No. 13."

• • •

(Tr. 298) "Sir, it would take some time to read this. I am going to offer it in evidence.

"MR. WISE: Same objection. There is no evidence that there is any direct connection between Delaware Sports Service and this man who apparently has some connection with a telephone number in Boston.

"THE CHAIRMAN: Let it be admitted as Intervenor's Exhibit No. 15, noting Mr. Wise's objection."

• • •

(Tr. 366) "Mr. Wise, so the record may be clear, would you state your specific objections to all of these exhibits, so that we may have the issue sharply in focus here on admissability?

"MR. WISE: My first objection is that they are not relevant. The question before this Commission is whether Delaware Sports Service is giving out information which furthers gambling. That is my first objection, that they are not relevant."

• • •

"Thirdly, as to a great many of the records that have been introduced, most of the records that have been introduced there are conclusions drawn by Mr. Wassmer included in the records which are predicated upon information which he says he got somewhere else. So they are clearly hearsay."

Illegal Evidence

(Tr. 22) "Q. Now, Mr. Smith, you have testified that you have made what we call a Western Union money order analysis, and tried to ascertain the identity of the persons sending the money orders. What did you find with respect to the addresses on these money orders that were sent?

"A. Well, as I testified—

"MR. WISE: May I object at this point and call the Attorney General's attention, and this witness's attention, to a law of the State of Delaware which makes it a criminal offense for this witness to divulge the contents of a message intended for somebody else.

"I refer to Title 11, Section 756, and Sesction 757, of" (Tr. 23) "the Code of the State of Delaware, which was ruled, in the case of State vs. Tollin, as applicable to police officers.

"It makes it a criminal offense for them to disclose information relating to a message intended for another."

• • •

(Tr. 24) "MR. WISE: Yes, sir, I again respectfully call the Commission's attention to the fact that this witness is now in Delaware; that we have a law which prohibits the disclosure of the contents of any such message unless it was obtained as a result, or was produced as a result of a court order of a court."

(Tr. 25) "having competent jurisdiction to order the production. And it goes on further to provide that whoever reads, takes, copies, makes use of, discloses, publishes, or testifies concerning any dispatch or message, communication, or report intended for another in this State shall for each offense be fined not less than $500 or imprisoned for not more than one year, or both.

"And there is a decision in Tollin vs. State where our Superior Court ruled that law meant exactly what it said, and that even a police officer could not testify to the contents of such a message unless he had obtained that message and its contents as a result of a court order authorizing him to obtain it."

• • •

(Tr. 25) "THE CHAIRMAN: I am going to overrule the objection on the ground of our Rule No. 187, which reads:

'No person shall be excused from testifying or producing any book, document or paper in any investigation or inquiry by or upon hearing before the Commission, or any member or examiner thereof, upon the ground that the testimony, evidence, book, document or paper required of such person may tend to incriminate such person or subject such person to penalty, or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction,

matter or thing concerning which he shall, under oath, have testified or produced incriminating evidence.' "

• • •

(Tr. 310) "Q. All right, as a result of furnishing the New Jersey State Police numbers, and southern New Jersey, what happened, if you know, and tell us the basis of your knowledge?

"A. I was told by Major Stockburger that as a result of—

"MR. WISE: Mr. Chairman, just so the record will show it, I object to all of this testimony on two specific grounds: (1) that it is a violation of the Delaware Law for him to have done what he did do; that he did not have an order from a court authorizing him to disclose any of this information; (2) that what he is saying is the rankest kind of hearsay.

"THE CHAIRMAN: I note your objection, Mr. Wise."

Opinion Evidence

(Tr. 29) "Q. Mr. Smith, based upon your experience as an investigator in the Rackets Bureau, and as head of the Rackets Bureau for the Queens County District Attorney's office in New York, what is your opinion concerning the possible uses of the kind of information which you know has been transmitted by Delaware Sports Service?

"MR. WISE: I object, Your Honor. It is asking this man to usurp the function of this Commission."

• • •

(Tr. 30) "MR. WISE: I will add to it, in addition to his usurping the function of the Commission, he has not been qualified as an expert in the field he is now being asked to give an answer to the question. The Rackets, cover a rather broad subject.

"THE CHAIRMAN: I feel under Rule of Evidence 183 I am going to note Mr. Wise's objection, but the Commission will use"

(Tr. 31) "its own opinion as to this."

Dead Man Evidence

(Tr. 292) "MR. BOVE: Now, I also offer Intervenor's Exhibit No. 7 for identification into evidence."

• • •

"MR. WISE: Is it the State's position that this man was receiving the service rapidly?

"MR. BOVE: It is my position that he was a subscriber to the service, and that he has a criminal record, and that is"

(Tr. 293) "his criminal record."

• • •

"MR. WISE: I object to it. But if Mr. Bove wants to discredit the reputation of a dead man without any opportunity to cross-examine on it, let him do it."

• • •

"THE CHAIRMAN: Let it be introduced into evidence as Intervenor's Exhibit No. 7."

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IN THE

Supreme Court of the United States

October Term, 1964

No. 503

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
AND
THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964

No. 603

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

and

THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

STATUTES INVOLVED.

Section 671 of Title 11 of the Delaware Code provides:

§ 671. Definitions

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

"Call service" means the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service;

"Dissemination" means the act of transmitting, distributing, advising, spreading, communicating, conveying or making known;

"Person" or "whoever" means a corporation (including a public utility), partnership or association, as well as a natural person;

"Private wire" means any and all service equipment, facilities, conduits, poles, wires, circuits, systems by means of which service is furnished for communication purposes, either through the medium of telephone, telegraph, Morse, teletypewriter, loudspeaker or any other means, or by which the voice or electrical impulses are sent over a wire, and which services are contracted for or leased for service between two or more points specifically designated, and are not connected to or available for general telegraphic, telephonic or teletypewriter exchange or toll service, and includes such services known as "special contract leased wire service", "leased line", "private line", "private system", "Morse line", "private wire" but does not include the usual and customary telephone or teletypewriter service by which the subscriber may be connected at each separate call to any other telephone or teletypewriter designed by him only through the general telephone or teletypewriter exchange system or toll service;

"Public utility" means a person, partnership, association or corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

Section 674 of Title 11 of the Delaware Code provides:

§ 674. Business of disseminating gambling information; receiving gambling information

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance

of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Section 675 of Title 11 of the Delaware Code provides:

§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

Section 677 of Title 11 of the Delaware Code provides:

§ 677. Sections 671-676 as exercise of police power; construction

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

STATEMENT OF THE CASE

Nature and Stage of the Proceedings

This matter is before this Court on Petitioner's Petition for a Writ of Certiorari to review the decision of July 9, 1964, of the Supreme Court of the State of Delaware.

Prior actions in this case have been in the Public Service Commission and the courts of the State of Delaware. On July 9, 1964, the Supreme Court of Delaware,

on an appeal from the Order (R. Super. Ct.-15),[1] dated October 9, 1963, of the Superior Court of Delaware, affirmed *per curiam* (R. Sup. Ct.-7)[1] the opinion of the Superior Court. The Supreme Court Mandate of July 22, 1964 (R. Sup. Ct.-9), affirmed the Order of the Superior Court.

The Order of the Superior Court affirmed the Order (R. Com., D-23)[1] of the Public Service Commission of Delaware, denied re-argument, and permitted the Defendant, Diamond State Telephone Company, to discontinue its service to Plaintiff, Delaware Sports Service. A stay (R. Super. Ct.-16) of the Order of the Superior Court was granted pending the decision on appeal to the Supreme Court. The Order of the Superior Court was based on its opinions of August 6, 1963 (R. Super. Ct.-10) and October 7, 1963 (R. Super. Ct.-14), which were the result of the pleadings, briefs, and oral arguments of counsel before that Court.

Petitioner had previously appealed to the Superior Court from the order (R. Com., D-23) of the Public Service Commission of Delaware, dated October 10, 1962, denying a petition (R. Com., D-2) filed in that Commission by Petitioner. This petition had sought relief from the proposed discontinuance of Petitioner's telephone service by the Diamond State Telephone Company. The order of the

---

1. References to docket entries in the proceeding before the Supreme Court of the State of Delaware will be as follows: "R. Sup. Ct.- ___".

References to docket entries in the proceeding before the Superior Court of the State of Delaware will be as follows: "R. Super. Ct.- ___".

References to the record of the Public Service Commission will be as follows: Docket entries will be designated "R. Com., D-1," etc.; Exhibits of Intervenor, State of Delaware, will be designated "R. Com., IX-1," etc.; Exhibits of Respondent, Diamond State Telephone Company, "R. Com., RX-1," etc.; Exhibits of Petitioner, "R. Com., PX-1," etc.; Exhibits of the Commission, "R. Com., CX-1," etc.; references to pages in the transcript of the Hearing before the Public Service Commission will be designated "R. Com., H-1," etc.

References to material included in the Appendix to the Petitioner will be as follows: "P. App. ___".

Commission was based on the findings and opinion of the Commission dated September 12, 1962 (R. Com., D-19) and the opinion on reargument dated October 3, 1962 (R. Com D-22). The findings, opinion and order were the result of a four-day hearing consisting of approximately 700 pages of testimony (R. Com., D-25-27; H-1-699), some 45 exhibits (R. Com., D-28-31; IX 1-26; PX 1-14; RX 1-2; CX 1-3), the pleadings (R. Com., D-2, 4, 5) stipulations (R. Com., D-6, D-14) and briefs of counsel (R. Com., D-15-18).

Following the Mandate of the Supreme Court, the Attorney General notified the Telephone Company on August 7, 1964, of the Mandate and requested that it discontinue its service to Petitioner after 10 days therefrom unless Petitioner initiated further court remedies. Petitioner filed a Motion for a Temporary Restraining Order in the United States District Court for the District of Delaware on August 14, 1964. This Motion was denied. Petitioner then filed a Motion for a Preliminary Injunction together with his Complaint in the District Court on August 20, 1964; the State filed a Motion to Intervene; and a Brief schedule was set. The State of Delaware, Intervenor previously, was served with the Motion and Complaint and is concurrently appearing as Intervenor in the District Court through the Attorney General, together with the Diamond State Telephone Company as Defendant, to support the decisions and orders of the Delaware State Courts. Simultaneously with his action in the District Court, Petitioner seeks a writ of certiorari in this Court. The State of Delaware and Diamond State Telephone Company appear here as Respondents. This is the brief of the State of Delaware.

The State of Delaware does not believe that there is any value in merely replying sentence-by-sentence to Petitioner's contentions.[2] Instead, there is a need for a complete statement of facts to explain the history of the litigation, to cover the facts which are in the entire record, and to discuss the totality of the findings and opinions of the

2. References to Petitioner's Brief will be designated (PB- ___).

Commission, the Superior Court, and the Supreme Court. We rely, therefore, on our own Statement of the Case and our Argument.

History of the Litigation

The volume of "flash" race results provided by Delaware Sports Service has helped to nourish and nurture the malignant growth of organized bookmaking in a large part of the entire country. Telephone service is the life blood of the enterprise. Removal of this service would be a serious blow to crime. This is why we have moved from the Superior Court of Delaware, to the Court of Chancery, to the Public Service Commission, back again to the Superior Court, to the Delaware Supreme Court, to the United States District Court, and now to the United States Supreme Court, with side trips to the District of Columbia Public Utilities Commission and the McClellan Senate Investigations subcommittee's hearings on gambling and organized crime.

The findings and opinions of the Delaware Public Service Commission and the Superior Court support the irresistible conclusion demonstrated in prior proceedings and articulated by Judge Carey in an early scene from this drama, *Tollin v. State*, 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951):

> "This information was obviously of great help to those who receive or place bets, since it included not only racing results but also last-minute details prior to a race. Moreover, *I am not so naive as to believe that Tollin did not realize the news was being used by others to facilitate gambling.* (Emphasis supplied.)

1. Early Prosecution

Litigation with the Tollins dates back to 1950 when Joseph Tollin, deceased father of Albert Tollin, was charged with violation of Section 4063, Rev. Code of 1935, now Section 669 of Title 11 *Del. Code*. At that time, Joseph Tollin headed up Delaware Wired Music Company, Inc., which

maintained equipment at 839 Tatnall Street, Wilmington, to receive and disseminate "sporting news". On appeal, the court directed a verdict of acquittal because it found that the operation of a business the same as that involved in the case at bar did not violate *that particular statute. Tollin v. State,* 7 Terry 120, 78 A. 2d 819 (Gen. Sess. 1951).

2. 1952 Legislation

Subsequent to the above case, in an effort to close the legislative gap demonstrated by that decision, the General Assembly, on January 28, 1952, enacted 48 *Del. Laws,* Chap. 493, which became 11 *Del. C.* §§ 671-677. The pertinent sections involved in this case are Sections 671, 674, 675, and 677, which are set forth above under Statutes Involved.

3. Diamond State Telephone Co. Tariff

Diamond State Telephone Company filed a tariff with the Delaware Public Service Commission which provides as follows:

> 20. *Use of Service for Unlawful Purposes*
>
> "Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

4. Chancery Court Action

Shortly thereafter, on October 13, 1959, as a result of an investigation by the Delaware Attorney General's office in cooperation with law enforcement officers of various other states, the Attorney General sent the Diamond State Telephone Company a letter requesting it to discontinue its service to Delaware Sports Service unless Sports Service elected to test the matter in court. After Diamond State notified Delaware Sports Service, it filed a complaint on October 22, 1959, in the Court of Chancery of the State of

Delaware attacking the validity of Title 11 *Del. C.* § 675 and seeking injunctive relief.

On cross-motions for summary judgment, Vice Chancellor Marvel enjoined the Telephone Company from discontinuing service to Sports Service prior to a hearing before the Public Service Commission. *Tollin v. Diamond State Telephone Co.*, 39 Del. Ch. 350, 164 A. 2d 257 (Ct. of Ch. 1960).

This opinion was based solely on the pre-trial motions, without any evidence. The Vice Chancellor's decision was directed to the absence of a hearing provision in 11 *Del. C.* § 675, stating that "Plaintiffs' motion for summary judgment will be granted to the extent of enjoining the Defendant, Diamond State Telephone, from terminating Plaintiffs' present telephone service prior to a hearing on the use to which Plaintiffs put such service."

5. Public Service Commission Hearing, Findings, and Opinion

Subsequently, a further notice was given to the Telephone Company by the Attorney General and, in turn, on November 28, 1960, to Sports Service by the Telephone Company. This action precipitated the filing of a petition by Sports Service in the Public Service Commission (R. Com., D-2). The State of Delaware, through the Attorney General, intervened in this proceeding with the consent of petitioner and respondent (R. Com., D-5). The Commission first made a decision on December 14, 1961 (R. Com., D-12), that it had jurisdiction of the petition even if all calls received by Sports Service came from outside the State of Delaware.[3]

---

3. The premise of the alleged exclusive interstate nature of petitioner's business was not conceded by either the Attorney General or the Telephone Company and later refuted by evidence before the Commission (R. Com., H-236, 252, 255). It was also shown at the hearing that Western Union money orders, paying in advance for service, might be sent to Sports Service from outside the State by persons who might then call Sports Service from within the State to obtain racing results (R. Com., H-391, 683). Thus, this issue should be moot. Petitioner is contesting, however, the jurisdiction of the Public Service Commission in his Motion for a Preliminary Injunction before the U. S. District Court for the District of Delaware.

Thereafter, an extensive hearing before the full Commission was held for four days, March 12-15, 1962. In addition to a considerable amount of testimony and exhibits, the Commission, on its own motion and with complete agreement by all parties, visited Sports Service at its present location at 601 Tatnall Street, Wilmington, Delaware, to get a firsthand view of the operation.

On September 12, 1962, the Public Service Commission filed its Findings and Opinion (R. Com., D-19) denying the relief prayed for in the petition of Delaware Sports Service, thus clearing the way for the removal of the telephones. After denial (R. Com., D-22) of Delaware Sports Service's petition for rehearing (R. Com., D-20), the Commission entered the order (R. Com., D-23) from which Delaware Sports Service took an appeal.

We will analyze the findings and opinion of the Commission, giving references to the page numbers thereof appearing in R. Com., D-19.

(a) *Burden of Proof.* The Attorney General and Diamond State had contended that petitioner had the burden of proof; however, the Attorney General had determined to go forward with his evidence solely for the convenience of moving the hearings forward. The Commission ruled that the Attorney General's position was "well founded" (R. Com., D-19, pp. 3-4; P. App. 20a).

(b) *Evidence* The Commission reviewed the testimony of several of the witnesses (R. Com., D-19, pp. 5-10; P. App. 21a-25a) which will be reviewed in detail in the next section of this Statement of the Case. The Commission discussed the question of admissibility of certain of this testimony (*e.g.*, ruled in favor of admissibility of statements of Joseph Tollin, deceased, and ruled against admissibility of certain correspondence between State Detective Wassmer and various police departments). With respect to the Commission's utilization of evidence placed before it, the Commission determined to disregard certain

evidence out of fairness to petitioner, notwithstanding the provision of 26 *Del. C.* § 183 that the Commission "shall not be bound by the technical rules of evidence" (R. Com., D-19, pp. 9-11; P. App. 24a-25a).

The Commission reviewed the evidence offered by petitioner, including the testimony of Albert Tollin (R. Com., D-19, pp. 11-15; P. App. 25a-28a). There appears to be no controversy that Delaware Sports Service has persons working at or near various racetracks around the country, that these persons determine, by the use of a pitch-catch signal system or related scheme, the unofficial winner of a given race and telephone that information to Wilmington instantaneously. Customers of Delaware Sports Service can find out this information within 20-25 seconds after the race is over by sending a Western Union money order in advance and by thereafter calling Delaware Sports Service and receiving the name or number of the winner immediately. The question of the identity and occupation of his customers and the use of the information was the crucial inquiry. Although the Commission found that Joseph Tollin had admitted in a statement co-signed by Albert Tollin, and had expanded on this admission before the District of Columbia Public Utilities Commission that "our services have practically no value except to bookmakers and professional bettors" (R. Com., D-19, p. 8; P. App. 23a). Albert Tollin now disclaims this knowledge (R. Com., D-19, p. 14; P. App. 28a).

In addition, the members of the Commission visited the premises. Their findings, which are not elaborated elsewhere in the record, are found at page 15 of their Opinion (R. Com., D-19, p. 15; P. App. 28a-29a).

(c) *Findings.* The Commission, after stating that it reviewed the entire record at some length but had touched upon what it referred to as only the "more salient aspects" of the record, concluded that the record showed that there existed in the minds of Diamond State and the State of Delaware "an honest belief, if not a confirmed conviction",

that Delaware Sports Service was using Diamond State's service to further illegal gambling. The Commission concluded that Delaware Sports Service had failed to rebut this conclusion, setting forth its reasons therefor in its Opinion dated September 12, 1962 (R. Com., D-19, pp. 15-20; P. App. 29a-32a).

After publication of the Findings and Opinion of the Commission, Delaware Sports Service filed a petition for rehearing (R. Com., D-20). The petition for rehearing was not timely, but the Commission elected, in an effort of abundant fairness to petitioner, to overlook the procedural irregularity and consider the petition on the merits. The Commission qualified one finding relating to a statement concerning Albert Tollin's knowledge of his previous testimony.[4] In all other aspects the findings and opinion were unchanged (R. Com., D-22).

6. Superior Court Appeal

On appeal to the Superior Court of the State of Delaware from the order of the Public Service Commission, Petitioner's arguments related to alleged denial of due process, whether or not the Commission conformed to 26 *Del. C.* §§ 183, 187, and attacks on the evidence. The Opinion of the Superior Court (R. Super. Ct.-10) is set forth in Petitioner's Appendix (P. App. 2a-17a).

Following this decision in the Superior Court, Petitioner then filed a motion for re-argument (R. Super. Ct.-11) which was duly answered by Respondents (R.

4. ". . . Tollin's lack of knowledge primarily concerned his father's sworn testimony before the District of Columbia Public Utilities Commission. Albert Tollin's testimony before us was at variance with that of his father and his own signed statement on one very important point—the use to which bookmakers put Petitioner's service. The disparity between the sworn testimony of those who knew most about Petitioner's service cannot be diminished and was not satisfactorily explained by Petitioner. Our over-all evaluation of Albert Tollin's testimony remains unchanged, however, and we find no basis for changing the result."

Super. Ct.-12, 13). Petitioner's stated grounds for seeking re-argument were not only without merit, it also sought to re-litigate and repeat arguments already thoroughly considered by the court. Petitioner's motion for re-argument was therefore denied in the court's opinion dated October 7, 1963 (R. Super. Ct.-14). The appeal to the Supreme Court followed the Superior Court's order (R. Super. Ct.-15) of October 9, 1963.

7. Supreme Court Appeal

The appeal of Sports Service to the Supreme Court of the State of Delaware involved virtually the same arguments as those used before the Superior Court. Following briefing and oral arguments, the Supreme Court affirmed *per curiam* on July 9, 1964, the opinion of the Superior Court (R. Sup. Ct.-7). A Motion for Reargument was denied (R. Sup. Ct.-9). The Supreme Court then issued its Mandate of July 22, 1964, whereby the Order of the Superior Court was affirmed (R. Sup. Ct.-9).

8. Motion for Preliminary Injunction in United States District Court

On August 20, 1964, Delaware Sports Service filed a Motion in the United States District Court for the District of Delaware for a Preliminary Injunction. This Motion followed one filed on August 14, 1964, for a Temporary Restraining Order which had been denied by the District Court.

Analysis of Facts in Record Below

1. Nature and History of Plaintiff's "Business"

In the early days of their business, the Tollins received horse racing information from Continental Press Service, a service subsequently put out of business by the Kefauver Committee (R. Com., H-557).[5] A great deal of

5. See also *McBride v. Western Union Telegraph Co.*, 77 P. U. R. (NS) 65, 171 F. 2d 1 (9th Cir. 1948).

information about each race had been disseminated by the Tollins, as the court found in *Tollin v. State, supra.* Upon discontinuance of major sources of track information, Joseph Tollin set up his own system for rapidly transmitting race results from inside the track to his racing news headquarters in Wilmington. This system consisted of having a "pitcher" inside the track give wigwag signals or other pre-arranged signals to a "catcher" just outside the track who relayed the information to Sports Service in Wilmington where it in turn was distributed to various customers throughout the country (R. Com., H-9, 57, 60-63; JTDC-243-46).[6] See also *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363, 364-365 (1953).

Subsequent to the passage of the present statute in 1952 (particularly Section 674) prohibiting dissemination of horse-racing information for gambling purposes or in furtherance of gambling, the Tollins changed their mode of operation and tailored the kind of racing information flashed to customers to include only the unofficial winner of a given race (R. Com., H-526, 592; JTDC-248, 264). This information is the key information to off-track bettors and bookmakers for the following reasons: (a) the unofficial winner is almost always the final official winner (R. Com., H-132, 212); (b) the service is so rapid (varying from instantly to no more than a minute) (JTDC-249; R. Com., H-632). In fact, the service is so fast that a customer, by holding a telephone line to Sports Service from just before the time a race should start can establish the times of actual race start and finish with the

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6. In Florida, such methods for obtaining and distributing horse racing information prior to 30 minutes from the end of the race, with exceptions not pertinent here, is a violation of Florida laws (R. Com., IX-8; H-87-92, 110-111, 115). "JTDC" will hereafter refer to the testimony of Joseph Tollin before the District of Columbia Public Utilities Commission on April 23, 1958, made a part of this record by Exhibit "C" to Stipulation of August 10, 1961 (R. Com., D-6). The page numbers refer to that transcript.

accuracy needed by a bookmaker to prevent being past-posted or to engage in past-posting illegal off-track bettors (R. Com., H-608; PX-3, p. 306). Since there are usually fixed intervals between races, e.g., 30 minutes, knowledge of the actual time of the first race allows the customer accurately to calculate the times of subsequent races that day (JTDC-249-50); (c) having up-to-the-minute information on winners helps the bookmaker in making decisions on "lay-offs" on subsequent races; (d) it stimulates further betting by informing the bookmaker's customer if he has won, thereby allowing him to place further bets the same day (R. Com., H-130-33, 182-184).

An example of the attempt by Delaware Sports Service to tailor its operations to avoid the present statute is the unexplained contention of Albert Tollin that telephone calls from within the State of Delaware are not accepted by Sports Service.[7]

The Tollins have always conceded that speed in transmitting results is their stock-in-trade and that they would be out of business without it (R. Com., H-581, 619, 622-23, 627). Joseph Tollin readily admitted that their service is faster by some 12-40 minutes than the other services, including Armstrong and Triangle, corroborating the testimony of other witnesses (R. Com., H-376, 515-518, 616; JTDC-249, 256). Even Albert Tollin so concedes (R. Com., PX-3, p. 341). It is only when some feature race is radioed or televised directly, either as a public service of the network or for a paying advertiser, that Sports Service's timing is equalled or bettered, but these instances are infrequent.

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7. Compare Albert Tollin's inability to give a reason for not selling to Delaware customers (R. Com., H-666) with his unconvincing alleged method of distinguishing such calls by their degree of clarity (R. Com., H-682) and his admission that he did not know where the calls came from (R. Com., H-655).

2. Customers of Delaware Sports Service

The procedure for obtaining information from Sports Service is fixed and simple. A person using any name he chooses sends in to Sports Service a Western Union money order of $20 for one result, $30 for two results, $40 for three results, or $50 for four or five results (R. Com., H-603, 605). Later, allowing sufficient time, approximately 1½ hours (R. Com., H-622-23), for receipt of the money order, he calls in to Sports Service and receives the number of track results he has paid for from the track of his selection (R. Com., H-77-81). Fictitious names and addresses are commonly used by the subscribers, and the money order and calls for service may emanate from different locations (R. Com., H-88, 105, 110, 113; JTDC-246). While Albert Tollin maintains that Sports Service operators always admonish the callers that the information is not to be used illegally (R. Com., H-561), there is no way of checking on one already engaged in illegal betting.[8] If the payment is received in advance, the information is always given out (R. Com., H-603).

As a matter of fact, Albert Tollin claimed that he has never tried to find out who his customers are (R. Com., H-539). He conceded that the flash service was of value to bookmakers (R. Com., H-627-28) but that he has never tried to ascertain whether or not any of his customers are bookmakers. He has not even checked the names of customers (Mitchell Slifken, Santo Damiano, and Frank Sorrentino) who the McClellan Committee in their hearings of August 22-31, 1961, advised him are bookmakers (R. Com., H-564). He claimed not to know whether the names used by customers are fictitious (R. Com., H-562). With respect to the *one* customer whom he had *met,* he said he would not be surprised to learn that he was in the business of disseminating horse racing information (R.

8. See Commission's Findings, R. Com., D-19, p. 17.

Com., H-553, 575, 576, 619). He later testified that he sold results to Angelo Rossetti in Boston and also received horse racing information from him (R. Com., H-661, 681). Rossetti has a long criminal record including gambling offenses (R. Com., IX-15).

Albert Tollin purported to believe, moreover, that bookmakers would have little use for his services and that his customers were really touts, horse owners, horse trainers, or persons who send bets via others to the track (R. Com., H-549-52, 566-67). The alleged reason why these people pay for his expensive service rather than wait a half-hour and receive it free from regular press services is that they must relieve their extreme anxiety and cannot wait (R. Com., H-581-83). This contention is made even more amazing by the testimony of an accountant for the McClellan Committee that the average *annual* gross income of Sports Service for the years 1955 to 1960 was approximately $262,700 (R. Com., PX-3, p. 322). Albert Tollin was unable to name a single person in these categories who subscribed to his service (R. Com., H-566, 567, 569). In contradiction, Joseph Tollin freely conceded that none of these persons would have a use for the service (JTDC-249-51, R. Com., IX-14).

It is well to recognize at this point that Albert Tollin not only disclaimed knowledge of his customers but also disclaimed any expertise in the bookmaking business (R. Com., H-557). More importantly, he corroborated the testimony of others that his father, Joseph Tollin, was an *expert* on both horse racing and bookmaking (R. Com., H-381, 557-559). The only conclusion possible, therefore, from Albert's own testimony, is that greater weight is to be given the testimony of his father, Joseph, than his own with respect to the uses of the information disseminated by Sports Service.

3. Joint Statement of Joseph and Albert Tollin Dated April 14, 1958

Both Albert and Joseph Tollin signed, on April 14, 1958, a revealing statement (R. Com., IX-14) as to their business. This statement was witnessed by State Detective Walter J. Wassmer and Thomas LaVernia, an investigator for the Chesapeake and Potomac Telephone Company. The significant part of the statement reads:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors."

Albert's later lame assertions that he did not want to upset his father (R. Com., H-558-59) and that he did not read the statement (R. Com., PX-3, p. 304) as excuses for his signing should be given little weight in the light of his foregoing admissions.

4. Joseph Tollin's Testimony Before District of Columbia Public Utilities Commission

Subsequently, on April 23, 1958, Joseph Tollin testified before the Public Utilities Commission of the District of Columbia, in connection with an application of a company named Sports News Service, Inc., for telephone service in Washington, and commented further on the need of bookmakers and professional bettors for his service (JTDC 249-50; emphasis supplied):

> "Q. Is there a need for that service?
>
> A. There is a need for that type of service, because so many different sections want to know the off time of that first or particular race so that they can then judge for the rest of the day what they are going to be able to do. They don't have to call back for the service no more. Laurel is going off at 1:30, which is

official time for it to go off, they know it goes off at 1:38, they know they have got five to eight minutes in each race that they can lag behind and still be in the clear.

Q. Why is that necessary, to know whether they are in the clear or not?

A. *Well, if they are interested in taking bets or making bets, it works both ways.*

Q. I wish you would explain to me, sir. Why is it so important to know what is the off time of the race?

A. Well, it is important to know that because those conditions can be—*you have more time to know how you are able to take a bet.* See, a lot of people come in late, and *a lot of people want to bet after they are over*, too, if you are foolish enough to take the bet.

Q. So people who are interested in taking bets want to get the fastest service available, is that right?

A. That's right.

Q. *For two reasons, to know how late to take a bet and also to keep somebody from betting on a race that's already been run.*

A. *That's right.*"

Joseph Tollin further freely testified (JTDC-256; emphasis supplied):

"Q. Is their service of any value to bookmakers?

A. Yes, sure. See, no service is just as valuable to bookmakers, because if he wanted to take his business up to one o'clock and stop, he can go to the next day and it's just as valuable to him; that's the end of it.

Q. *But your service is more valuable?*

A. *It's more valuable, because he can get a larger amount of business by being able to stay in business till two o'clock, three o'clock, and so on, to the end of the*——

Q. *The rest of the afternoon, hey?*

A. *Until the afternoon is over.*"

It is important to realize that Joseph Tollin was referring to the same kind of race result, i.e., the name and post number of the unofficial winner, as is disseminated by Sports Service today. Furthermore, the evidence is uncontroverted that Joseph Tollin was the organizer and guiding light of Sports Service until his death in 1960 and understood fully the uses being made of its service. It is submitted also that Albert Tollin's detachment from his customers and apparent lack of knowledge of their uses of his information are all part and parcel of the carefully contrived mode of operation tailored to minimize the risk of Sports Service being held in violation of our gambling laws.

5. Testimony of Law Enforcement Officials

At the expense of prolonging this Brief, the State feels it is advisable to place before the Court an analysis of the testimony of the law enforcement officials who testified. The purport of their testimony must be placed in its proper perspective because of the fact that Petitioner has quoted portions of this testimony out of context and otherwise unfairly presented this testimony in its Brief.

The witnesses called by Intervenor included highly placed law enforcement officers from several states, as well as a member of the Thoroughbred Racing Association Protective Bureau. These are some of the persons from outside Delaware who have participated in the effort to rid Delaware of this valuable aid to organized gambling.

It is important to reiterate at this point that the Delaware Public Service Commission based its decision on evidence of sound probative value. While the rules of the Commission allow it to admit hearsay and opinion (Rule 183), and a considerable amount of such evidence entered the record from both parties, the Commission distinguished such evidence so as to ground its decision on evidence following the technical rules. The following summary is, therefore, not a complete summary of all the evidence introduced, but some of the evidence having probative value supporting the findings of the Commission.

Former Delaware State Detective Walter J. Wassmer testified[9] as to the toll analyses he secured by use of an Attorney General's subpoena. These official records of the Telephone Company showed telephone calls between Sports Service and other telephone numbers in and out of the State. Law enforcement officials in the states involved were requested to determine whether or not the persons to whom these numbers were listed had criminal records and specifically gambling records. These toll analyses have been made periodically in Delaware (R. Com., H-273-75, 291, 309, 383-84, 407). Out-of-state law enforcement officers also subpoenaed records of Western Union to ascertain who was sending moneys to Sports Service. These officers also made toll analyses of calls to Sports Service from particular telephone numbers in their states (R. Com., H-19-26, 29, 55, 64, 67-76, 117, 124).

The Delaware investigation covered twenty-six states (R. Com., H-325-26). Due to the obvious limitations on funds, facilities, and personnel, representatives from all of these states were not brought to Wilmington to testify at the hearing before the Commission. Instead, Detective Wassmer testified at length on some of the states from which witnesses were not produced. His testimony is supported by official police records and communications from and to those states including the criminal records of some of the persons involved. Since many of these documents were prepared in the regular course of business, they are admissible under the formal rules of evidence. The states include Indiana, Illinois, Ohio, New Jersey, Pennsylvania, Massachusetts, and New York (R. Com., IX-4-7, 15, 16, 18, 20-25; R. Com., H-20-25, 277, 280-84, 294, 296-99, 311, 315-25, 360-62).

Detective Wassmer made personal visits to New Jersey, New York, Pennsylvania, and Washington, D. C.,

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9. Another aspect of Wassmer's testimony (i.e., the statement of Joseph and Albert Tollin, R. Com., IX-14) has been referred to previously.

to verify the information obtained from the local officers (R. Com., H-275, 291, 293). Furthermore, the record shows that the telephone toll analyses were made in a legal manner (R. Com., H-274) and were based on toll slips and Telephone Company records personally compiled by Wassmer (R. Com., H-309, 383-84, 407). There is no merit to the suggestion that this information was illegally obtained in violation of 11 *Del. C.* § 757 or otherwise. It was unnecessary to refer to telephone conversations to obtain the desired information, which was available from regularly kept records of the Telephone Company.

Another technique used by law enforcement officers was the use of mail surveys. From a 30-day survey beginning March 11, 1960, of Sports Service mail transmitted through the Wilmington Post Office, Detective Wassmer was able to identify only one actual person, Kenneth Hanna. Hanna had a criminal record which included arrest and conviction for gambling offenses (R. Com., H-364, 412-13).

Witnesses from the State of New York were Francis X. Smith, Chief of the Rackets Bureau of the District Attorney's Office of Queens County; Benjamin Kossoff, Queens County Detective; and Daniel D. Moynihan, Special Agent with the New York State Commission of Investigation.

Mr. Smith testified that he has been investigating the activities of Sports Service and its employees in New York since late 1952 (R. Com., H-8), when he met Ralph Atlas, alias Rudolph Atlas, Joseph Tollin's overseer of the pitcher-catcher teams (R. Com., Ex. C., p. 243). See *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363 (1953). Mr. Smith related how racing results were obtained from inside the track by Sports Service employees who immediately relayed the information by telephone to Wilmington (R. Com., H-9-10). Both Mr. Smith and Mr. Kossoff testified as to their continuing toll analyses of Western Union money orders sent to Sports Service (R. Com., H-29, 68-70); that over the years they had been able to find only one

actual person, Frank Acetta, who had sent such a telegram, because of the fictitious names and addresses used by the other subscribers. Frank Acetta has a bookmaking record which was duly authenticated and admitted into evidence (R. Com., IX-4; H-26-28, 40, 42, 48, 50).

In addition to testifying on toll analyses, Mr. Kossoff described how he sent $30 in May 1961 by money order to Sports Service and then called in the next day to Sports Service and obtained the winners of the first and second races at Aqueduct for that day (R. Com., H-67-68, 71-72).

Mr. Moynihan described in detail the use of toll analyses in planning and conducting large scale raids, which he supervised (R. Com., H-117), on gambling joints in the State of New York (R. Com., H-121-141; R. Com., IX-5). As to the value to bookmakers of "flash" results, Mr. Moynihan added to the other reasons given (past-posting, etc.) the value to the bookmaker in rapidly evaluating his position to determine whether he should "lay off" bets on subsequent races that day or take more of them himself (R. Com., H-124-25). When asked how he knew that horse racing information received from Sports Service was being used for bookmaking purposes, his *personal* knowledge was described in detail in the record (R. Com., H-118-119).

Martin Dardis, Investigator for the Attorney General of Florida, testified that he telephoned Albert Tollin early in January, 1962, to ascertain if he could obtain Florida track information after Hialeah opened (R. Com., H-88). On February 6, 1962, Dardis sent Sports Service a $30 money order under the name of "Pete Taylor" for results on Hialeah's fifth and sixth races on February 9 (R. Com., H-104-105). On February 9, 1962, Lt. Frank Kappel, Dade County Police Supervisor, in the presence of Dardis telephoned from Florida to the Sports Service Wilmington telephone number OL 6-2501 and obtained the winner of the fifth race at Hialeah at 3:29 P. M. and the winner of the sixth race at 4:00 P. M. The information on the fifth race was obtained within a few minutes of the finish of the race.

Kappel actually waited on the telephone while the race was being run, in spite of the fact that Florida has the aforementioned 30-minute delay law (R. Com., H-105-110).

Edward C. McMahon, an Agent for the Thoroughbred Racing Association Protective Bureau (T. R. A. P. B.), testified as to the great value of flash race results to off-track bettors (R. Com., H-180-84) and to the stringent measures most race tracks have instituted to prevent flash dissemination (R. Com., H-178-79, 212).

In addition to the *personal knowledge* attested to by the witnesses, as outlined in this summary and given in full detail at the hearing, it was the *expert opinion* of *all* the law enforcement officers who testified, that the information disseminated, i.e., the name and number of the official winner of a race, is usable only by bookmakers and professional bettors (R. Com., H-31-32, 44, 45, 48, 52, 59, 124, 125, 131-38, 151-53, 155-56, 377). The T. R. A. P. B. official, another expert, corroborated these opinions (R. Com., H-179-86, 207-08, 216). For this reason flash dissemination of racing information is prohibited by the Code of the T. R. A. P. B. and the Maryland Racing Commission (R. Com., H-218, 472, 482, 485-86, 489, 491). Joseph Tollin, himself, stated this to be the only possible use (R. Com., IX-14).

6. Petitioner's Evidence

The witnesses called by Delaware Sports Service not only failed to rebut the record made by Intervenor, and they not only failed to show any legitimacy to the operation of Delaware Sports Service, but these witnesses themselves fortified the State's position.

The Petitioner's attempt to compare its activities with those of legitimate established radio stations and newspaper media is obviously without merit.[10] There are, of course,

10. The Commission so concluded. Findings and Opinion, R. Com., D-19, pp. 11-19.

many crucial differences and, as one witness testified, such a comparison is unfair (R. Com., H-346). The most important difference, of course, is the speed with which a racing result is brought from the track to the user. The media represented by witnesses in this phase of the Petitioner's case are in the general news business and obtain their income from advertisers, not subscribers to their broadcast services (R. Com., H-344, 426-27, 439, 509). They do not have fictitious subscribers (R. Com., H-345) or subscribers paying them $20 to obtain the result of one race (R. Com., H-345). They obtain their racing information usually by means of the wires of a regular news service, such as the Associated Press, and are not in violation of the law (R. Com., H-343); i.e., they do not employ pitchers and catchers from inside to outside the track (R. Com., H-342, 421-26, 440, 448). They do not give out racing results to telephone callers and in no sense operate a call or flash service (R. Com., H-343-344, 425-26, 437, 452, 507-08, 510). Most importantly, they all testified that there is a considerable time delay between the end of a race and the time of any broadcast they make concerning the race, except for special events (R. Com., H-422, 468-70, 504). In fact, the testimony establishes that elimination of this time lag would violate F. C. C. regulations and policy (R. Com., H-344-45, 427-28, 507-08), which were set up for the specific purpose of preventing the use of flash horse racing results by bookmakers.

Another witness for Petitioner, the Vice President and General Manager of Delaware Park, described the facilities and method of operation used by regular news media to transmit race results out of the track to their offices. A pertinent fact is that the public telephones at the track are not allowed to be used throughout the racing period of the day to prevent their use at that time in transmitting results (R. Com., H-489-91).

Conclusion Regarding Petitioner's "Statement of the Case"

Since the party which is presenting this case to this Court has seen fit not to explain the entire facts which are in the record of the proceedings in the State courts or to discuss the totality of the findings of the Commission and courts whose decisions it questions here, we have found it necessary in the preceding pages to go into perhaps more detail in this connection than is ordinarily required.

REASONS FOR NOT GRANTING THE WRIT

Summary of the Argument

I. Argument as to Due Process of Law

There are factual misstatements and distortions in Petitioner's Brief which must be corrected. For example, there is abundant evidence of sound probative value that Petitioner's business is devoted almost exclusively to the furtherance of illegal gambling on horse races. Some evidence inadmissible under the technical rules of evidence was concededly let into the record at the Hearing before the Public Service Commission of Delaware because that administrative agency is not bound by the technical rules of evidence. Although such commissions are not bound by the technical rules for the sound reason of protecting them from reversible error, their decisions must rest, nevertheless, on a residuum of legal evidence. The cases of *Pennsylvania Publications v. Pennsylvania Public Utility Commission,* 349 Pa. 184, 36 A. 2d 777 (1944), and *Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957), which Petitioner heavily relies on are easily distinguishable from the case at bar in that there was no residuum of legal evidence at all to support their decisions. In the case at bar, all reviewing courts have found much more than enough probative evidence to support the Commission's findings and decisions.

Another factual distortion is Petitioner's contention that he is classifiable with legitimate news media. The crucial differences are set forth fully in our Statement of the Case and in our Argument and need not be summarized here. Similarly, the other erroneous contentions of Petitioner as to the facts of this case are also met therein.

As established in many cases on the discontinuance of telephone service, the standard of proof to be met is that the telephone company need have only "reasonable grounds," "probable cause," "preponderance of the evidence," etc., that Petitioner was furthering illegal gambling in order for the telephone company to be justified in moving to shut off Petitioner's telephones. The "proof beyond a reasonable doubt" required in criminal cases is not necessary in this case, a civil proceeding. This Court has already upheld the validity and constitutionality of a statutory provision in this respect, 18 U. S. C. § 1084(d), in the recent case of *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), *aff'd. per cur.* 376 U. S. 782 (1964). The *Telephone News System* case is a clear guide to the denial of this Petition for a writ of certiorari.

II. Argument as to Freedom of Speech and Press

It is found necessary, again, under this section of the Argument to refute certain erroneous contentions of Petitioner as to the facts. These are set forth in the Argument and need not be specifically mentioned in this Summary.

The police power of a State to regulate telephone service so as to suppress the furtherance of illegal gambling by means of "flash" results of horse races is well recognized. A State statute aimed at suppressing such "flash" results and illegal gambling was upheld as not violative of free speech and press in the *Telephone News System* case, *supra*. There are also many cases from State courts wherein this police power of a State is upheld.

The Delaware statute, 11 *Del. C.* § 674, making it a crime to further illegal gambling by means of private wires or a call service was likewise held constitutional by the Superior Court of the State of Delaware.

I. Argument as to Due Process of Law

A. Refutation of Certain of Petitioner's Assertions

At the beginning of his argument for the granting of the writ (PB-16) as well as at other places in his Petition, the Petitioner makes inadvertent factual misstatements and distortions which must be corrected. In the first sentence, it is contended that this case concerns the efforts of the State of Delaware to bar Petitioner from what he classifies as a completely lawful and proper business. He contends that he has a right to engage in this business and that he is being deprived of his right by court decisions lacking a rational evidentiary basis in violation of the Due Process clause of the Fourteenth Amendment.

It is manifest that the State of Delaware has requested the Diamond State Telephone Company to discontinue service to Petitioner because Petitioner's business is devoted to furthering illegal gambling. The record is replete with evidence of sound probative value that Petitioner's flash service giving out almost instantaneously the unofficial first-place winners of horse races is designed almost exclusively for the use of illegal bookmakers and is tailored to minimize its chances of being held guilty of a crime. No one is so naive as to believe that Petitioner's enormous business is based on anything other than illegal bookmaking. He has not introduced a single shred of evidence refuting or counteracting any of the facts established by Respondents. The only basis for Petitioner's contention that his business is lawful is that he has not been convicted for violation of a criminal law; all of the lower court actions have been civil proceedings. Nevertheless, the evidence in this case has been classified by every court that has studied the record as being more than sufficient to meet the evidentiary standards required in civil actions. We rely on and respectfully refer the Court to our "Statement of the Case," the sum-

maries of facts given in the Opinions of the Public Service Commission (PB-21a-31a) and the Superior Court (PB-10a-15a), and the entire record itself.

Petitioner's hit-and-run tactic of quoting (PB-64a-78a) snatches of the record out of context and in some instances from testimony concededly inadmissible under formal rules of evidence is meaningless. Petitioner seizes (PB-23) on the mere fact that some formally inadmissible evidence entered the record to characterize the entire record as "almost wholly . . . opinion evidence, hearsay and other inadmissible evidence," "lacking in a rational evidentiary basis," etc. Nothing could be further from the truth. At the hearing before the Public Service Commission, it was recognized that a certain amount of normally inadmissible evidence was admitted because of Title 26 *Del. C.* § 183, which provides that "the Commission shall not be bound by the technical rules of evidence." The rule is standard and a sound one for commissions because it recognizes that members of administrative agencies are not experts on the technical rules of evidence and protects them from reversible error. Nevertheless, such commissions must base their decisions on a residuum of legal evidence irrespective of how much inadmissible evidence enters the record. *Geegan v. Unemployment Compensation Commission,* 6 Terry 513, 76 A. 2d 116 (Sup. Ct. 1950); *U. S. ex rel. Dong Wing Ott v. Shaughnessy,* 116 F. Supp. 745 (D. C. S. D. N. Y. 1953). In the case at bar, the Commission pointedly ignored what it considered to be inadmissible evidence and based its findings and holdings on admissible competent evidence. The reviewing courts so held on appeal.

It was a lack of any evidence at all that distinguishes the main cases cited by Petitioner in the first section of his argument from the case at bar. Petitioner's own quotation (PB-19-21) from *Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Commission,* 349 Pa. 184, 36 A. 2d 777 (1944), contains the reason why this case serves him no purpose here. As the court there stated in the passages

quoted by Petitioner, "the record here is entirely barren of anything . . .". And "here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise" (36 A. 2d 779-780). It is illustrative, however, that Petitioner has omitted in his quotations from the *Pennsylvania Publications* case, *supra*, the most pertinent language, which reads as follows:

> "*Fogarty v. Southern Bell Telephone & Telegraph Co.*, D. C. E. D. La., 34 F. Supp. 251 and *Hamilton v. Western Union Telegraph Co.*, D. C. N. D. Ohio, E. D. 34 F. Supp. 928, cited and relied upon by appellee [Pennsylvania Public Utility Commission], are readily distinguishable on their facts from the instant case. *In both those cases there was ample evidence to support the utilities' contention that they had reasonable grounds to suspect the illegality of the subscribers' business. Here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise.*" (36 A. 2d 777 at 780. Emphasis added.)

In the case at bar, there is abundant evidence, as well as a legislative history, to provide a basis on which "to suspect the illegality" of Petitioner's business, and *Pennsylvania Publications* is, therefore, clearly distinguished. It should be noted further that the latter case is not a recent one and may be characterized as one with an unusually naive view of modern illegal gambling on horse races.

Petitioner's reliance (PB-17) on *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957), is similarly misplaced. The Court there also held that there was no factual basis whatsoever for the conclusion of the Board that the applicant failed to meet the Board's admission standards. Thus, *Schware* is also distinguished from the case at bar.

In a similar vein, Petitioner asserts (PB-17) that the decisions below rest "entirely upon the rationale that if the recipient of information could use it for a purpose prohibited by law, the bare communication of that information

. . . may be prohibited . . .". This assertion flies in the face of the record and the reasoning of the courts below and is a misstatement of the facts. There is likewise no merit to Petitioner's remarkable contention (PB-18) that the flash dissemination of the unofficial winner of a horse race is of no value to bookmakers.

Petitioner's reference (PB-18, 21) to criminal conspiracy leads one to suspect that he is preparing again to argue the case of *United States v. Falcone, et al.*, 109 F. 2d 579 (2d Cir. 1940), aff'd. 311 U. S. 205 (1940). This case, a criminal action for conspiracy against suppliers of sugar to bootleggers, is a situation completely unrelated to the case at bar. In any event, the court there made the following pertinent statement:

> "There are indeed instances of criminal liability of the same kind [as civil liability], where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive." (109 F. 2d 579 at 581)

Judge Hand further conceded that his view that the "conspirator" or "abettor" must be a co-promoter to be guilty of conspiracy was not accepted in other Federal circuits.

Petitioner asserts (PB-17) that he does no more than legitimate news media. It is, of course, extremely infrequent that radio and television stations give instantaneous or rapid transmission of a specially featured horse race. Indeed, they are normally concerned that transmission is not rapid so as to violate F. C. C. regulations and policy. It is not true, as Petitioner maintains (PB-17), that the racing information involved here is transmitted "with impunity" by legitimate media. Petitioner's own witness at the hearing before the Delaware Public Service Commission, Mr. Bryan Field, Vice-President and General Manager of Delaware Park, testified (R. Com., H-489-91)

that even public telephones inside the race track are kept locked and out of use while races are being run so as to prevent their use in rapid transmission of race results. The differences between Petitioner's business and legitimate news media are obvious.

The evidence as to the crucial differences between Petitioner's activities and legitimate established brokerage houses, television and radio stations, race tracks and newspaper media have been set forth in this Brief and in the Commission's Opinion, dated September 12, 1962 (R. Com., D-19, pp. 11-19) as well as in numerous other places in the record, and need not be repeated here. The courts have uniformly recognized these differences. See, for example, *Howard Sports Daily, Inc. v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of Appeals, 1941); *McInerney v. Ervin*, — Fla. —, 46 So. 2d 458 (Supreme Ct. 1950); *Paterson Publishing Co. v. New Jersey Bell Telephone Co.*, 21 N. J. 460, 122 A. 2d 599, 602 (Supreme Ct. 1956); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Supreme Ct. 1954); *Rubin v. Pennsylvania Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (Superior Ct. 1962).

In *Sports News Service, Inc. v. Chesapeake & Potomac Tel. Co.*, 25 P. U. R. 3d 106 (D. C. 1958), the District of Columbia Public Utilities Commission [11] made the following conclusions based upon extensive findings of fact:

> "The commission having made the foregoing findings upon the evidence of record, concludes:
>
> "1. Obtaining race results and furnishing them as an essential service to professional gamblers and bookmakers is calculated to aid or abet gambling and bookmaking.
>
> 2. Gambling and bookmaking, and aiding and abetting a gambler or bookmaker are criminal offenses in the District of Columbia.

11. See Joseph Tollin's testimony before this Commission. JTDC 249-272.

3. Fast race results through wire services are subscribed to, and needed by, illegal, off-track gamblers and bookmakers in their operations.

4. 'Fast', 'immediate', or 'flash' results of horse races are not generally obtainable through legitimate, authorized news channels.

5. Petitioner's plan of operation, to service subscribers throughout the United States and Canada with fast results of horse races via the telephone, has the essential attributes and is patterned after the operation of Delaware Sports Service in every material respect.

6. Delaware Sports Service caters exclusively to professional gamblers and bookmakers throughout the country by furnishing to its subscribers, for a substantial fee, flash results of horse races as fast as the races are run.

7. The cost of service, such as Delaware Sports Service furnishes, and which Petitioner proposes to furnish, would be prohibitive for persons other than professional gamblers or bookmakers.

8. Petitioner's proposed plan of disseminating fast horse race information throughout the United States and Canada by telephone is inherently geared to the needs of illegal gambling and bookmaking.

9. Subscribers to petitioner's proposed news dissemination service would be composed primarily of bookmakers and professional gamblers, the only type of clientele needing and able to afford, this type of service.

10. There is no evidence of record upon which this commission can reasonably find that there is a legitimate public need for, or public interest in, the proposed service.

11. There is no evidence of record upon which this commission can predicate a finding that the petitioner has been discriminated against.

12. Petitioner's proposed service is designed to and would be used in violation of law.

13. In refusing the service requested by petitioner, respondent acted reasonably and in compliance with its published tariff, heretofore approved by this commission." (25 P. U. R. 3d 106, 112-113)

It is the criminal nature of the case, as well as the non-existence of a statute like 11 *Del. C.* § 674, that makes Petitioner's heavy reliance on *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363 (1953) inappropriate. In *Pollack,* the defendants were prosecuted in a criminal action under certain state criminal statutes for conspiracy, policy, bookmaking, and contriving a lottery. They were not prosecuted for furthering illegal gambling although it was recognized by the court that, in fact, this was what the defendants were doing in operating their pitcher-catcher system from the race track to a nearby telephone connected to the Delaware Wired Music Company [the predecessor of Delaware Sports Service] in Delaware, 120 N. Y. S. 2d 363 at 365. As the court said, at 364: ". . . the whole question boils down to whether a scheme used by these defendants contravenes existing criminal statutes in this State [New York]." It was found, of course, that the pitcher-catcher scheme in and of itself did not violate the particular New York statutes involved. It was with reluctance, at 369, that the court reached this decision because it was obviously convinced, at 365, 368-369, that the defendants were primarily furthering illegal gambling. The decision on the narrow question faced in *Pollack* is not, therefore, in any way pertinent to the case at bar. This Court can recognize *Pollack,* however, as an early factual authority on the nature of Petitioner's business.

B. Legal Posture of the Case.

Any question of burden of proof is actually moot because the Attorney General of Delaware, without conceding any duty to do so, went forward with the evidence. Findings and Opinion of Commission, dated September 12, 1962 (R. Com., D-19, pp. 2-4; P. App.-19a-21a). The Commission agreed with the Attorney General's contention and gave the petitioner the privilege of merely conducting his case as if in rebuttal (R. Com., D-19, pp. 15-16; P. App.-29a). Sufficient evidence was found in the record to justify the Telephone Company in its contemplated withdrawal of service. The rebuttal was found unconvincing.

The Vice Chancellor of Delaware had held that, to the extent that 11 *Del. C.* § 675 purported to authorize the Telephone Company to discontinue service upon notice by the Attorney General without opportunity for a hearing, it was invalid. A hearing was held. There is nothing in the Vice Chancellor's opinion which holds that action pursuant to § 675 is invalid if a hearing is held. Whether the authority for removal of the telephones is pursuant to § 675 after hearing, or pursuant to § 674, or pursuant to Tariff No. 20, or as a result of the jurisdiction of the Commission not to permit utilities to continue service used to violate public policy (See Findings and Opinion of Commission dated December 14, 1961, R. Com., D-12, pp. 30-34), the fact remains that Petitioner Delaware Sports Service has had an eminently fair hearing. Not only has it failed to show the legitimacy of its enterprise, which it was required to do, it failed to meet and rebut the evidence presented against it to the satisfaction of the Commission as fact-finders, to the Superior and Supreme Courts on review, and, we respectfully submit, to this Court on consideration of the Petition for a writ of certiorari. Certainly any suggestion by Petitioner that the findings of the Commission were against the weight of the evidence would be without merit. *Application of Diamond State Telephone*

Co., 49 Del. 203, 113 A. 2d 437 (Sup. Ct. 1955); cf. *In re Delaware Power & Light Co.*, 48 Del. 149, 99 A. 2d 270 (Super. Ct. 1953); cf. 4 Davis, *Administrative Law* § 29.11. If the proper weight is given to the findings of the Commission, which had an opportunity to observe the demeanor of the witnesses, etc., the result is inevitable. *Application of Diamond State Telephone Co.*, 51 Del. 525, 149 A. 2d 324 (Sup. Ct. 1959).

Since the ultimate risk of non-persuasion rests at all times at the door of one who demands affirmative action somewhat in the nature of an injunction—here, Delaware Sports Service—the failure of proof must be laid at the doorstep of Delaware Sports Service. In such cases the burden of proof is not on the State or the utility. *So. Bell T. & T. Co. v. Nineteen Hundred One Collins Corp.*, 83 So. 2d 865 at 869 (Fla. S. Ct. En Banc 1956); IX Wigmore, *Evidence* (3d Ed., 1940) §§ 2485, 2487, pp. 274-279.

All that the Telephone Company had to show is that it had an honest doubt as to the legality of the use of its service by Petitioner. In *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (D. C. N. D. Ohio, 1940), the rule is stated:

> "A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an *honest doubt* as to its legality." (Emphasis supplied.)

In *Tracy v. So. Bell T. & T. Co.*, 37 F. Supp. 829, 830 (D. C. S. D. Fla., 1940), the rule is stated thus:

> "* * * Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the telephone company had *probable cause* or *reasonable grounds* to believe is being used in the maintenance and conduct of such illegal or immoral enterprise." (Emphasis supplied.)

There are numerous authorities supporting utilties in the discontinuance of service on facts much less compelling

than the unchallenged facts of this case. We shall refer to but a few of them.

In *Tagianetti v. New England T. & T. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954), on this same issue the Rhode Island Supreme Court said:

> "On the contrary it has been held that where a public utility's published tariffs 'contain a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law,' the court will not by injunction aid one whom the utility justifiably believes is illegally using its service. *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928, 929. Moreover in that case the court said: 'Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character.' There is no intimation in the opinion in that case that the company is bound to refrain from discontinuing service before first giving the user notice of the charge against him and an opportunity to be heard thereon."

To the same effect see *McBride v. Western Union Telegraph Co.*, 171 F. 2d 1 (9th Cir. 1948); *Hagerty v. So. Bell T. & T. Co.*, 59 F. Supp. 107 (D. C. S. D. Fla. 1945); *Hagerty v. So. Bell T. & T. Co.*, 145 Fla. 51, 199 So. 570 (Sup. Ct. 1940); *Fogarty v. So. Bell T. & T. Co.*, 34 F. Supp. 251 (D. C. E. D. La. 1940); *Shillitani v. Valentine*, 296 N. Y. 161, 71 N. E. 2d 450 (Ct. of A. 1947); *Matter of*

Movie Time, Inc., 277 App. Div. 1057, 101 N. Y. S. 2d 71 (S. Ct. 1950); *Tela-News Flash, Inc. v. Dist. Atty. of Queens County*, 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Rosenthal v. N. Y. Tel. Co.*, 141 N. Y. S. 2d 459 (S. Ct. 1955).

In *Rosner and Buckeye Wire Corp. v. N. Y. Tel. Co.*, 205 N. Y. S. 2d 476 (S. Ct. 1960), the court stated that if an illegal use is substantiated the subscriber must show a clear right to restoration of service. In upholding a refusal of service, the court gave great weight to petitioner's failure to refute the evidence of an illegal use, as is the case presented by the record before the Commission, and to petitioner's failure to produce evidence of the legitimacy of the use, as in the case before the Commission. See also *So. Bell T. & T. Co. v. Nineteen Hundred One Collins Corp.*, 83 So. 2d 865 (Fla. S. Ct. En Banc 1956).

In *Paterson Publishing Co. v. N. J. Bell Tel. Co.*, 21 N. J. 460, 122 A. 2d 599, 602 (Sup. Ct. 1956), a similar case in which the court relied heavily upon the testimony of the same representative of the Thoroughbred Racing Association Protective Bureau who testified in this matter before the Commission, the New Jersey Supreme Court said:

> "Where a telephone company knows or has sufficient reason to know that its services are being used in aid of bookmaking it has the right (and indeed the duty) to discontinue them."

The court placed considerable reliance upon the decisions cited in this section of our Brief. The court stated that it would not upset the ruling of the New Jersey Board of Public Utility Commissioners which refused to restore service, in the absence of an affirmative showing by the petitioner that it was unreasonable, arbitrary or capricious.

In the recent case of *Rubin v. Pa. Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (1962) the court held that a utility has not only the right but a duty to

refuse to render service being used for a criminal purpose and that the test of the telephone company's refusal is whether there is evidence to support the contention that the utility had reasonable grounds to believe that the service *would be* used illegally. In that case, again, the court relied heavily upon the decisions cited.

Apparently hearsay testimony is barred before the New Jersey and Pennsylvania Public Utility Commissions and apparently the contention was not made that official police records duly authenticated are admissible. Even so, the Pennsylvania court sustained the use of these reports and their admissibility for *the purpose of showing what information the utility and the police had before them in judging whether or not refusal of the service was reasonable.* The court stressed petitioner's failure to refute the evidence of the illegitimate use and petitioner's lack of credibility, as in the case at bar.

Regardless of the question of who has the burden of going forward with evidence and regardless of the question of the legal right of a utility to revoke telephone service without a hearing, the fact remains that the Attorney General did go forward with the evidence and that there was a hearing. The test is whether or not, based upon what facts are available, there was an honest, bona fide doubt that Petitioner's service was being used predominantly for gambling purposes or in furtherance of illegal gambling. The standard is the same, at least within the context of this case, whether the standard is denominated "reasonable grounds," "probable cause," "preponderance of the evidence," etc. *Hamilton v. Western Union Telegraph Co.,* 34 F. Supp. 928 (D. C. N. D. Ohio 1940); *Martinelli v. New York Tel. Co.,* 205 Misc. 503, 129 N. Y. S. 2d 411 (Sup. Ct. 1954) (advice of law enforcement agencies is material on the question of good faith and reasonableness); *Tela-News Flash, Inc. v. District Attorney of Queens County,* 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Tracy v. Southern Bell*

T. & T. Co., 37 F. Supp. 829 (D. C. S. D. Fla. 1940); *Taglianetti v. New England T. & T. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Paterson Publishing Co. v. New Jersey Bell Telephone Co.*, 21 N. J. 460, 122 A. 2d 599 (Sup. Ct. 1956). Those seeking termination of telephone service are not to be held to the absurd standard of proof beyond a reasonable doubt.[12] Such a standard would be required only on a criminal charge and the disposition of any related criminal prosecutions would have no bearing on the narrow issue here before the Court. *McBride v. Western Union Tel. Co.*, 171 F. 2d 1 (9th Cir. 1948); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Lipton v. New York Tel. Co.*, 125 N. Y. S. 2d 251 (Sup. Ct. 1953). There is no merit to Petitioner's inferences that the case at bar is a criminal case by his unqualified use of criminal cases, e.g., *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363 (1953).

It is important to note that *Telephone News System, Inc., v. Illinois Bell Telephone Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. *per cur.* 376 U. S. 782 (1964), is not inapposite here as Petitioner would lead this Court to believe (PB-19, Footnote 42). The fact that the business involved in that case transmitted the names of the first, second, and third winning horses in any given race and the price or odds paid for a bet placed on the winning horse, whereas Petitioner here reports the name and number of only the horse finishing first is a minor, insubstantial factual difference, as attested to by expert witnesses and all the other evidence. The legal principles set forth there are clearly pertinent, and it is worthwhile to explore this case in depth.

12. Albert Tollin, in a moment most protective for his clientele, suggested to the McClellan Committee that he would discontinue service to any of his customers who could be "conclusively proved" to be using his service for gambling purposes (R. Com., PX-3, p. 338). This suggestion is amplified in Petitioner's "Statement of the Case" (PB-8).

In the 1962 case, originated by a letter of April 25, 1962, from the United States Department of Justice to Illinois Bell requesting discontinuance of service to Telephone News System, a one-judge Federal court determined that the News System's service violated the Illinois statute, § 28-1 (a)(10) of the Illinois Criminal Code of 1961. This statute provides that a person engages in illegal gambling when he knowingly transmits information as to wagers, betting odds or changes in betting odds by telephones or similar means. The court concluded that plaintiff violated this statute by playing a recording to anyone who dialed a widely advertised telephone number giving the names of the horses finishing first, second and third and the mutuel price paid by the winner, even though this information was obtained from United Press International Service at least twelve minutes after the finish of the race. A finding of fact was that the information was obtained by plaintiff from twelve to thirty minutes after the finish of the race and that, furthermore, an average of five or ten minutes of additional time necessarily elapsed before the received information could be recorded and transmitted to persons dialing the plaintiff's telephone number. Plaintiff did not receive any payment from those dialing in but relied solely on a $600.00 per week payment from Illinois Sports News for spot advertising commercials. While the Government did provide one bookmaker who admitted using the service, it is obvious from the court's opinion that it relied heavily on the facts that Plaintiff gave no credible legal use for its service, going out over 70 telephone lines, and that no one placing a legal bet at a race track would have any need to resort to Plaintiff's facilities. Parenthetically, it should be noted that in the case at bar the information can be flashed instantaneously to customers; Petitioner's telephone number is not widely advertised; he is paid by those receiving the information; all expert witnesses testified to the effect that Petitioner serves primarily bookmakers; there is a signed statement by both Tollins admitting this fact; and there is no other logical explanation

for his vast annual business. The court in the 1962 case then went on to find that Plaintiff was not violating 18 *U. S. C.* § 1084(a) simply because that statute deals only with persons "engaged in the business of betting or wagering," an activity that Plaintiff concededly was not engaging in. The court next found that Plaintiff's activities were in the ambit of § 1084(d), which provides that a common carrier, subject to the jurisdiction of the F. C. C. must shut off service, after reasonable notice, to any subscriber where the carrier has been notified by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that the subscriber is or will be using the facility or service for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law. It is also provided in § 1084(d) that it does not prejudice the right of a person affected to seek a hearing to secure a determination that the service should not be discontinued. Since § 1084(d) had never previously been considered by a Federal court, the court in this 1962 decision decided that a three-judge District Court should be convened to pass on the constitutionality of § 1084(d). This led, of course, to the 1963 decision.

In the 1963 case, the three-judge court in a lengthy opinion upheld the constitutionality of both § 1084(d) and the Illinois statute. In doing so, the court, among other things, completely refuted the argument often made by Petitioner here that everything is gambling information. The court made the point that whether or not the transmission of particular information is a crime under given circumstances is to be determined not by reference to the term "gambling information" in § 1084(d) but by reference to Federal, State, and local criminal laws which proscribe the sending of gambling information over wire communication facilities (220 F. Supp. 621 at 625). In the case at bar, it is 11 *Del. C.* § 674 and public policy, the Delaware *Constitution*, Art. II, § 17, and 11 *Del. C.* §§ 671

et seq., that prohibit the furtherance of illegal gambling. It was the finding of the Public Service Commission that Petitioner has been furthering illegal gambling, and it would be the dictate of § 1084(d), if applicable to the case at bar and it is not, and case law that Petitioner's service be discontinued. The court made the further point that the shutting off of service is not punitive or penal in character but is preventive and regulatory. The whole argument that Petitioner makes wherein he claims that he is being deprived of his life blood property right without having been found guilty of violating a law is completely exploded by the Illinois District Court in the 1963 opinion. The whole purpose of legislation such as 18 *U. S. C.* § 1084(d) and 11 *Del. C.* § 674, of tariffs such as the one involved in the case at bar, and of the public policy of not condoning or aiding illegal activities is to regulate telephone service so as to suppress illegal gambling. Petitioner's loss of service is incidental to the main object. In the case at bar, the shutting off of telephone service is not an additional penalty for violating § 674, but it is a sanction to prevent the continued transmission of extremely useful information to bookmakers and thereby hamper and hopefully prevent their activities. The court also mentioned a variety of other reasons why § 1084(d) is not penal in character.

Since this Court has affirmed the decision in the 1963 opinion, it stands as a clear and authoritative guide to the denial of this Petition for a writ of certiorari.

C. There Was Sufficient Admissible Evidence Before the Commission to Support Its Findings, Opinion and Order

A main thrust of Petitioner's Due Process argument is an objection to certain evidence. Our position is that the findings of the Commission are supported and are properly within the framework of the legal posture of the case. With respect to the evidentiary questions raised by Petitioner, our answer is as follows: (1) The Commission dis-

regarded much of the evidence attacked by Petitioner; (2) In any event, the Commission was not bound by rules of evidence and could have considered evidence which it, out of an abundance of fairness to Petitioner, did not consider; (3) Petitioner is in error in his attack on certain evidence;[13] (4) There is abundant evidence in any event; and (5) The Delaware Superior and Supreme Courts so held on review. We have already mentioned the fact that the Commission did not consider certain testimony, much of which is attacked in the Appendix to Petitioner's Brief. There is no need to belabor this issue further.

Furthermore, the Commission did not have to take this action. It could have considered formally inadmissible evidence in addition to admissible evidence under 26 *Del. C.* § 183 which permits it to conduct hearings without being "bound by the technical rules of evidence." Surely the Delaware legislature did not intend by this invitation that there would be "built-in" error on appeals which it also provided for in the same statute. 26 *Del. C.* § 192; 48 *Del. Laws,* Ch. 371, §§ 3, 19 (1951). The only limitation is that which was set forth in *Geegan v. Unemployment Compensation Commission,* 6 Terry 513, 76 A. 2d 116 (Sup. Ct. 1950). See also *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U. S. 292 (1939) and *Schware v. Board of Bar Examiners,* 353 U. S. 232 (1957). The limitation is that a finding may not be based exclusively

13. For example, with respect to Detective Wassmer's testimony, the record refutes Petitioner's sweeping inference in the Appendix of his Brief that all of his testimony was based on hearsay. Nor was there a violation of 11 *Del. C.* § 757 by Wassmer. That statute proscribes disclosure of "any dispatch or message, communication or report intended for another." Wassmer merely testified to a compilation of data, called a toll analysis, of official records kept in the ordinary course of business of the telephone company showing telephone numbers which had been in telephone contact with Delaware Sports Service. Similarly, the information from police officials of New Jersey, Pennsylvania, and Washington, D. C., was verified by personal visits of Wassmer. Further, the Commission did not accept "similar information from persons who did not testify under oath before this Commission" (R. Com., D-19, p. 11).

on incompetent evidence. Such is obviously not the case here.

We have already discussed the evidence in considerable detail and no useful purpose would be served by repeating it here. Suffice it to say that there is clearly sufficient competent evidence. (a) The uncontradicted facts of the nature of business (speed, "pitchers-catchers," fictitious names, high prices, etc.) coupled with *expert* opinion that this business can only be used for aiding bookmakers and professional bettors for purposes of past-posting, bet stimulation, lay-offs, etc.,[14] is sufficient in and of itself to support the findings. *Tela-News Flash, Inc. v. District Attorney of Queens County,* 96 N. Y. S. 2d 338 (S. Ct. 1950), aff'd. 101 N. Y. S. 2d 245 (S. Ct. App. Div. 1950); *Paterson Publishing Company*[15] *v. New Jersey Bell Telephone Co.,* 21 N. J. 460, 122 A. 2d 599 (Sup. Ct. 1956). (b) Absurdity is approached when "lack of evidence" is asserted, when there is added to the foregoing the admission in the statement signed by Albert Tollin (*supra*) and amplified by the statement made by Joseph Tollin before the District of Columbia Public Utilities Commission[16] (*supra*) which Albert ac-

14. Compare the testimony of experts to the effect that knowing the unofficial winner immediately after the race furthers gambling predominantly, with Petitioner's many references in his Brief to his "lawful" business.

15. It is interesting to note that the court in the *Paterson* case found that the company involved there ". . . acquired the information largely by long distance telephone calls to a corporation in Delaware . . ." (122 A. 2d 599 at 601).

16. Petitioner's reference (PB-78a) to the testimony of a dead man is without merit. The testimony of Joseph Tollin before the District of Columbia Public Utilities Commission, Exhibit C to Stipulation of August 10, 1961 (R. Com., D-6) is clearly admissible since Joseph Tollin was the senior partner of Delaware Sports Service, Petitioner here. As such, his statements and declarations, duly authenticated (Stipulation of August 10, 1961, par. 4), are admissible against the partnership as admissions of a partner, whether deceased or not. 6 *Del. C.* § 1511; *Wieder v. Lorenz,* 164 Ore. 10, 99 P. 2d 38 (Sup. Ct. 1940); IV Wigmore, *Evidence* § 1078; *Cf. East Girard Savings & Loan Association v. Honlihan,* 373 Pa. 578, 97 A. 2d 23 (Sup. Ct. 1953). In any event, it would be admissible as a declara-

knowledged was a reference to bookmaking (R. Com., PX-3, p. 312). (c) When other direct, competent evidence is added to the expert interpretation of the uncontroverted evidence and the admissions, the conclusion is irresistible. For instance, the raid on Talent Enterprises was testified to upon personal knowledge;[17] this is also true of raids by other law enforcement officers on other establishments elsewhere;[18] the Commission viewed the premises; toll analyses were testified to by the persons who made them; criminal records of persons in telephone contact with Petitioner were duly authenticated, showing gambling arrests and convictions.

We submit that the entire record, which we respectfully request the Court to consider as completely as possible,

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tion against interest of a witness. V Wigmore, *op. cit. supra*, §§ 1460, 1475; McCormick, *Evidence*, pp. 546-554. Petitioner cannot now be heard to argue that the entity is different now from what it was prior to Joseph Tollin's death. It apparently did not consider it so in filing its petition before the Commission. *Compare* Exhibit A to Stipulation of August 10, 1961, par. 3, see especially page 3, with Court of Chancery Complaint, Exhibit B to Stipulation of August 10, 1961. It did not consider the entity different when it endeavored to make a point that it had offered to terminate its service to persons violating Delaware law (R. Com., H-531-532). Certainly the "Dead man's Statute" (10 *Del. C.* § 4302) is not applicable. *American Security Co. v. Shatterproof Glass Corp.*, 154 F. Supp. 890 (D. Del. 1957), aff'd. 268 F. 2d 769, *cert. den.*, 361 U. S. 902.

17. It is immaterial in this proceeding that the case did not go to trial and was not decided on the merits. What is material is that these officers testified that the Talent Enterprises called Delaware Sports Service, that on the premises they found no evidence of any kind of legitimate business, that they did find horse racing information paraphernalia and that they did find a list of persons who resided in Delaware and who have bookmaking records to the personal knowledge of these officers. They described the premises involved and the description is similar to Petitioner's premises.

18. Note, for example, that Inspector Moynihan's testimony is clearly based on personal knowledge: "I know for a fact personally that some of the telephones in contact with the Delaware Sports Service were in fact being used to accept bets for bookmaking. I personally know that for a fact" (R. Com., H-118-19).

contains sufficient unassailable, direct[19] evidence to measure up to any standard of proof—even proof beyond a reasonable doubt. In fact, even hearsay evidence can be added to this, under 26 *Del. C.* § 183, or even without that statute, as certainly being material to prove to the Commission what *the law enforcement agencies and Diamond State had before them upon which they formed their belief as to the nature of Petitioner's service. Rubin v. Pennsylvania Public Utility Commission,* 197 Pa. Super. 157, 177 A. 2d 128 (1962).

D. Conclusion

It is submitted, therefore, that Petitioner has not been denied due process of law, consistent with the Due Process clause of the Fourteenth Amendment, and further that there are not important and unsettled questions relative to this issue which should be settled by pronouncement of his Court.

II. Argument as to Freedom of Speech and Press

A. Refutation of Certain of Petitioner's Assertions

Petitioner in this section of his Brief relies heavily on the same contentions made in his argument as to Due Process, *i.e.,* that he is operating a business similar to that of legitimate news media. It would be an unnecessary burden on the Court to repeat here the refutation of this contention which is set forth in the foregoing section of

19. Even if the evidence is considered circumstantial (which it is not), every other reasonable hypothesis as to the Petitioner's use of the service has been excluded. The essential issues are established by the testimony of Albert Tollin alone, who could not tell the Commission what use was being made of his service, as well as by the entire record. The fact that Petitioner does not know who its customers are has no effect whatsoever except to strengthen Respondents' case. *Howard Sports Daily, Inc. v. Welker,* 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941).

this Brief. Suffice it to say here that all the evidence is contrary to Petitioner's contention and he has yet to advance any credible explanation for his enormous annual business except the furthering of illegal gambling on horse racing. Indeed, there is abundant affirmative evidence that he is almost exclusively engaged in furthering illegal gambling.

Petitioner's cases cited at PB-24 are, therefore, almost irrelevant to the issue at hand. Certainly, his quotation from *Thomas v. Collins,* 323 U. S. 516, 530-531 (1945), is in no way contradictory to Respondents' position. There is undoubtedly a clear public interest suffering directly from the continuance of Petitioner's telephone service. *Telephone News System, Inc. v. Illinois Bell Telephone Company, supra,* as well as the many other cases cited in the preceding section of this Brief.

Notwithstanding Petitioner's contention (PB-24-25) to the contrary, this Court has clearly spoken as to whether or not and under what conditions an administrative agency and a telephone company can discontinue telephone service. It affirmed in the *Telephone News System* case the holding of a three-judge Federal District Court that 18 *U. S. C.* § 1084(d) and § 28-1(a)(10) of the Illinois Criminal Code are constitutional. Certainly, the case at bar raises no constitutional questions outside the scope of that decision.

While 18 *U. S. C.* § 1084(d) has not been involved in any of the proceedings before the Delaware courts or Public Service Commission, closely comparable State statutes and public policy as well as the Telephone Company tariff have provided individually separate and sufficient grounds for the actions in the State courts. The statutes and the tariff are set forth in our "Statement of the Case." The public policy against furthering illegal gambling is founded on Article II, § 17, of the *Constitution* of the State of Delaware and the clear legislative intent evidenced in Title 11 *Del. C.* §§ 661 *et seq.,* as well as on comparable constitutional and statutory provisions of other

states. Our reliance on 18 *U. S. C.* § 1084(d) here is only to the extent that it has clearly been held to be constitutional and therefore is solid authority in favor of the constitutionality of the State statutes, the Telephone Company tariff, etc., relied on in the case at bar. We specifically do not introduce § 1084(d) into this Brief as a comment or inference as to jurisdiction, a possible issue which Petitioner has not raised before this Court but one which he is concurrently contesting before the United States District Court for the District of Delaware.

This Respondent respectfully believes that he might end this argument as to freedom of speech here and still have presented a sufficient basis to this Court for denying the Petition for a writ of certiorari. We believe, however, that this would neglect certain possible, though unmeritorious, arguments that Petitioner could have made in his Brief as he has in previous proceedings on this matter. The following sections, therefore, are included here for the purpose of thorough, comprehensive treatment.

B. Applicability and Constitutionality of 11 *Del. C.* § 674

We contend, of course, that § 674, a criminal statute, sets forth an offense which when found in a civil proceeding such as the one at bar, would suffice to cause the discontinuance of Petitioner's telephone service. But § 674 is not the only basis for discontinuance of telephone service. The Telephone Company's tariff is a sufficient basis. The general regulatory supervision to prevent violation of Delaware's public policy is a sufficient basis.

Among the many individual and separate bases for action in this case, therefore, is 11 *Del. C.* § 674. This statute was clearly intended to cover this type of case since it was enacted after the unsuccessful prosecution of Tollin under § 669, quoted *supra*. As provided in § 677, it is an exercise of the police power of the State of Delaware to protect the public welfare, health, peace, safety and morals

of the people. The Petitioner has stipulated (R. Com., D-6, par. 3) that he operates a call service as defined in § 671 and has thereby clearly placed himself within the purview of § 674. Nevertheless, he has previously argued that the proscription against dissemination of "information in furtherance of gambling or for gambling purposes" in § 674 is limited to information prior to an event and information which assists in furthering gambling, wagering on a future. In support of this theory he cited *France v. United States,* 164 U. S. 676 (1897) and *United States v. Bergland,* 209 F. Supp. 547 (D. C. E. D. Wis. 1962). Both of these cases were prosecutions under criminal statutes prohibiting use of interstate facilities in (a) the placement of bets or wagers or to carry on illegal gambling (*Bergland*) or (b) transporting any paper "purporting to be . . . a chance . . . dependent upon the event of a lottery." (*France*) The Courts in those cases held that *those criminal statutes* must be strictly construed in those *criminal prosecutions* and that the statutes did not apply to interstate activity after the race or event was over because the element of chance was missing. Neither of those cases involved prosecution under a statute similar to § 674 against one whose flash business by design is a valuable aid to bookmakers and professional bettors for bet stimulation, lay-offs, past-posting and other purposes. We do not even contend, as was the case in *Bergland,* that the Tollins themselves gathered the flash information from the race track for the purpose of utilizing it themselves to place a "bet" in another city with an unsuspecting bookmaker on a race, the result of which had been determined. If this were a criminal prosecution against Tollin for doing the foregoing under a statute exactly the same as the Federal statute in that case (which is completely dissimilar from § 674) then this Court would have to determine whether or not it wanted to follow *Bergland.* Since the cases are so dissimilar there is no need for us to comment on whether or not *Bergland* is bad law.

Similarly, the case of *Parkes v. Bartlett*, 236 Mich. 460, 210 N. W. 492 (Sup. Ct. 1926) has been a prior focus of attention. In considering the *Parkes* case, it should first be recognized that the statute involved there prohibited, by its very language, both harmful and harmless publications. 11 *Del. C.* § 674 does not contain language which gives the statute such broad application; it is clearly limited to the prohibition of the dissemination or receipt of information in furtherance of gambling or for gambling purposes by means of private wires or by means of a call service. It is also sufficient to say that, since 1926, the importance to bookmakers of horse racing information, both before and after a race, has been recognized by all concerned and is before this Court. It is important to note that, in *Parkes*, one part of the legislation there involved was *held not to violate due process even though summary prohibitions were involved.* It is undoubtedly significant that, in *Parkes*, the statute was applied to regular news media.

Petitioner has also previously referred to two Federal cases decided under the new Federal statutes relating to interstate gambling. *E.g.*, 18 *U. S. C.* § 1084. *Telephone News System, Inc. v. Illinois Bell Telephone Company*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D. 1962); *Kelly v. Illinois Bell Telephone Company*, 210 F. Supp. 456 (D. C. N. D. Ill., E. D., 1962) (R. Super. Ct.-5, pp. 39, 43). Neither of those cases, decided by the same judge on the same day, passed on constitutional questions.

Significantly, the court in the *Telephone News System* case, *supra*, 220 F. Supp. 621, 638-640, considered this same argument as to the definition of gambling. It found there that rapid transmission of race track results was the object of the State legislation and that this object is not an unreasonable exercise of the police power of a State. Clearly, 11 *Del. C.* § 674 with its proscription against dissemination or receipt of information to further gambling by means of private wires or a call service has as its object this same regulation and suppression of flash race results to illegal

gamblers and is not an unreasonable exercise of police power.

It is also most significant that the constitutionality of 11 *Del. C.* § 674 has already been passed upon by a Delaware court. *State v. Michael C. Benicky, et al.*, Criminal Actions Nos. 45-46, 1959, Nos. 96-101, 1960, Superior Court of Delaware, Kent County (Storey, J., unreported opinions dated March 28, 1961, and May 9, 1961). In *Benicky*, Judge Storey upheld the statute as not in violation of freedom of speech and also upheld it against attacks that it is vague and indefinite.

To the same effect as the decision in *Benicky* are the following comments of the Vice-Chancellor of the Delaware Court of Chancery regarding Petitioner's shock at the alleged vast scope of the statute and in rejecting the same arguments that were made in *Benicky:*

> "Plaintiffs profess to be shocked at the allegedly vast scope of the statute under attack, contending that were it valid and to be enforced in a nondiscriminatory manner, it would penalize all persons engaged in giving out information concerning future events such as security and commodity futures and the like, however, I do not believe that the statute as a whole should be so unreasonably read, being of the opinion that it was enacted by the Legislature to deprive those who aid and abet the professional gambler and his clientele by giving flash results on sporting events of an essential tool, namely telephone service." (164 A. 2d 254 at 257)

Other statutes similar to that involved in the case at bar have been held not to violate constitutional provisions protecting freedom of speech. *State v. Western Union Telegraph Company*, 12 N. J. 468, 97 A. 2d 480 (Sup. Ct. 1953); *Howard Sports Daily, Inc. v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Southern Bell T. & T. Co. v. State ex rel. Trans-Radio Press Service, Inc.*, 53 So. 2d 863 (Fla. Sup. Ct. En Banc 1951). The question was not even raised in many of the other cases cited in this

Brief and involving similar state action. See also *Dunn v. Nevada Tax Commission*, 67 Nev. 173, 216 P. 2d 985, 993-94 (Sup. Ct. 1950).

Certainly § 674 is within the police power of the State; and no invasion of our liberty, free speech or free press is involved in an effort to permit the Telephone Company to remove its telephone lines and telephones from a principal aider and abettor of illegal gambling.

C. Regulations and Jurisdiction of the Public Service Commission

Petitioner has also previously engaged in what was apparently an attack on the first opinion of the Public Service Commission, dated December 14, 1961, dealing with the question of its jurisdiction of this action (R. Com., D-12; P. App. 35a-63a). It is sufficient to say in answer to such attacks that the Commission had ample authority under its regulations to conduct a hearing and then order a discontinuance of Diamond State's telephone service to Petitioner. The Court is respectfully referred to the opinion of the Commission wherein it considered at great length the question of its jurisdiction in this case. The Commission cited 26 *Del. C.* § 121 (R. Com., D-12, p. 27), 26 *Del. C.* §§ 124, 134 (R. Com., D-12, p. 28), Art. II, § 17, of the Delaware *Constitution* (R. Com., D-12, p. 30), and 11 *Del. C.* §§ 661 *et seq.* (R. Com., D-12, p. 31) as statutory authorities for its decision to accept jurisdiction. The Commission did not rely solely on 11 *Del. C.* §§ 661 *et seq.* nor on Diamond State's tariff, Par. 20, § 1, filed with the Commission (R. Com., D-12, p. 24). The Commission's conclusions are set forth fully (R. Com., D-12, pp. 30-34) and need no further amplification by the State.

D. Tariff of Diamond State Telephone Company

The foregoing discussion under sub-section (B) is applicable here and need not be repeated. In addition, it

cannot be asserted that 11 *Del. C.* § 675 is unconstitutional and hence Paragraph 20 of the Diamond State tariff is invalid. 11 *Del. C.* § 675 may be valid once a hearing has been held as is now the case. In any event, the tariff is valid. *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954); *Scance v. New Jersey Bell Telephone Co.*, 95 P. U. R. (N. S.) 16 (N. J. P. U. C. 1952).

Petitioner has previously attempted to make much of *Jordan v. Diamond State Telephone Co.*, (Unreported opinion, Court of Chancery of Delaware, C. A. 490, 1954). That case has no relation to the case at bar. In *Jordan*, the Telephone Company attempted to discontinue service without any notice from any law enforcement agency, and without producing any evidence that the telephone was put to an illegal use; the record there was completely barren of such evidence. The court emphasized that the Telephone Company had not been advised by law enforcement officials that an unlawful condition existed and then stated that where there is no such notice there has always been some tangible evidence which, if believed, "would warrant a *reasonable person to conclude* that an unlawful condition existed." The court then concluded that there was no such evidence in that case. In the case at bar, the record is replete with evidence that an unlawful condition exists in Petitioner's business.

Petitioner has also previously referred to *Katz v. American Telephone & Telegraph Co.*, 92 P. U. R. (N. S.) 1 (1951) as authority for the contention that the Telephone Company tariff is unreasonable and unjust. The *Katz* case has no binding force whatsoever; it has been rejected by the subsequent authorities referred to elsewhere herein; furthermore, the Federal Communications Commission there clearly recognized throughout its opinion that, upon proper notice and a hearing, a tariff regulation which forbade the use of service for an unlawful purpose or which would be used for an unlawful purpose would be valid; further, there

was no statute involved in that case similar to 11 *Del. C.* § 674; in addition, in that case, the Federal Communications Commission specifically held that in certain cases service could be discontinued even without notice. In short, all that *Katz* holds is that the particular wording of the regulation involved in that case, considering the circumstances here involved and the absence of a statute like ours, made the regulation unreasonable but that properly worded a tariff provision similar to that involved in the case at bar would be sustained. This analysis is supported by the later decisions herein cited which ignored *Katz*. The *Katz* decision was also questioned in a case comment in *65 Harv. L. Rev. 1255 (1952)*.

Any further reliance by Petitioner upon *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D. C. D. C. 1949) would be similarly misplaced. That case was decided in 1949, and, therefore, before most of the other cases mentioned by us herein.[20] In any event, *Andrews* is distinguishable because the court held only that the telephone service could not be cut off merely upon receipt of notice from the U. S. Attorney. The court held that evidence would be considered *even on affidavits*. Furthermore, *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954), similarly construed the effect of *Andrews*.

E. Public Policy

Diamond State Telephone Company does not have to rely on either statutes, Commission regulations, or the tariff to discontinue service to Petitioner. As set forth in the Superior Court Opinion (R. Super. Ct.-10, pp. 10, 11), a telephone company may take the necessary steps to discontinue its service where it is reasonably satisfied that such service is being utilized by its customer against public

20. As is true of the 1944 case of *Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Corporation*, 349 Pa. 184, 36 A. 2d 777 (1944).

policy, such as in the furtherance of bookmaking, an illegal enterprise in this and other states. *Tracy v. Southern Bell Telephone & Telegraph Co.*, 37 F. Supp. 829 (D. C. S. D. Fla. 1940); see *Taglianetti v. New England Telephone and Telegraph Co.*, 81 R. I. 351, 103 A. 2d 67, 70, 71 (Sup. Ct. 1954). A telephone company may also act to discontinue service where such service is against public policy. *Howard Sports Daily v. Weller*, 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (D. C. N. D. Ohio 1940); *Rubin v. Pennsylvania Public Utility Commission*, 197 Pa. Super. 157, 177 A. 2d 128 (1962); *Lipton v. New York Tel. Co.*, 125 N. Y. S. 2d 251 (1953).

F. Policing the Public Morals

Petitioner has previously used a quotation from the 1944 case of *Pennsylvania Publications, Inc. v. Pennsylvania Utility Commission*, 349 Pa. 184, 36 A. 2d 777, 781 (1944), made originally in *People v. Brophy*, 49 Cal. App. 2d 15, 33, 120 P. 2d 946, 956 (1942), to argue that the Commission is policing the public morals. These cases do not apply to the case at bar, as has been explained above, and are, in any event, outdated as to their naive view of modern illegal gambling on horse races. Nevertheless, we fully agreed with Petitioner's position that the Public Service Commission and the Telephone Company are not law enforcers nor keepers of the public morals. The Public Service Commission fully agr[illegible] also. Opinion of the Commission, dated December 14, 1961 (R. Com., D-12, pp. 27-28). But the Commission and the Telephone Company have the responsibility not to aid a calculated, brazen, premeditated, extravagant effort to violate the law or public policy by continuing to permit service to organized crime. They have been responsive to this duty.

This argument as to policing the public morals is an example of the tactic of arguing in broader terms than

necessary for the case at bar, as Petitioner also pointedly does in both sections of the argument in his Brief. It is another aspect of the smoke-screen technique. This technique cannot be permitted to obscure the state of the law as represented in the cases cited in our Brief.

G. Conclusion.

It is submitted, therefore, that Petitioner has not been denied the right of Free Speech and Press guaranteed by the First and Fourteenth Amendments and further that the public interest does not require that this Court make further determinations on this issue.

CONCLUSION

It is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 603.

DELAWARE SPORTS SERVICE, a Delaware Partnership Comprised of Albert Tollin, Blanche B. Tollin, Shirley T. Ingram and Frances T. Freezman,

Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

and

THE STATE OF DELAWARE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CONSTITUTIONAL PROVISIONS INVOLVED.

In addition to the constitutional provisions cited in the petition, this case involves Article II, Section 17 of the Constitution of the State of Delaware, which provides:

> "Section 17. Lotteries. The sale of Lottery Tickets, pool selling and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

STATUTES INVOLVED.

In addition to the statutes cited in the petition, this case involves Title 11, Section 677 of the Delaware Code, which provides:

> "Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

and Title 26, Section 183 of the Delaware Code which provides:

> "(a) All hearings before the Commission, or its designated representative, shall be public, and shall be conducted in accordance with the rules of practice and procedure prescribed by the Commission. In the conduct of such hearings, the Commission shall not be bound by the technical rules of evidence. A full and complete record shall be kept of all proceedings had before the Commission, or its representative, in any formal hearing, and all testimony shall be taken down by a reporter designated by the Commission, and the parties shall be entitled to be heard in person or by attorney, and to introduce evidence.
>
> "(b) After the conclusion of the hearing, the Commission shall make and file its findings with its opinion, if any, and its order thereon. Its findings shall be in sufficient detail to enable the court on appeal to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence."

COUNTERSTATEMENT OF THE CASE.

The essence of the petition for certiorari is that the order of the Delaware Public Service Commission (hereinafter sometimes referred to as "Commission") authorizing discontinuance of petitioner's telephone service violated the due process clause of the Fourteenth Amendment and infringed petitioner's right of freedom of speech and of the press because the Commission did not have a sufficient evidentiary basis on which to make its finding that Respondent, The Diamond State Telephone Company (hereinafter sometimes referred to as "Telephone Company") was justified in concluding that petitioner was using its telephone service for an unlawful purpose. Petitioner admits inferentially that if the Commission's order was based on competent evidence, there was neither a denial of due process nor an infringement of freedom of speech or press. Consequently, it is necessary to examine the evidentiary basis of the Commission's order.

Petitioner's statement of the case contains matter which is immaterial to the essential issue of sufficiency of the evidence and omits reference to an abundance of evidence which supports the Commission's order. It might be noted here that the transcript of the record of the hearing before the Commission covers 699 pages. Petitioner's appendix containing references to alleged incompetent evidence presented to the Commission covers approximately fourteen pages; in at least one instance, the same evidence is included more than once (Petition, pp. 68a, 77a).

The following references to the hearing before the Commission are not intended to be a complete review of the competent evidence presented to it, but only the salient parts of that evidence. It is respectfully suggested to the Court that almost every page of that record contains some evidence upon which the Commission could have based its findings and opinion.

The information disseminated by petitioner is necessary to bookmakers and off-track bettors because the unofficial winner is almost always the official winner (R. Com., No. 25, p. 132; No. 25a, p. 212);[1] the results of a race are generally available in less than a minute from the time the race is completed (R. Com., No. 27, p. 632); the service is so rapid it enables the bookmaker to determine the actual start and finish times of races (R. Com., No. 27, p. 608); and the speedy receipt of this knowledge assists him in making decisions on "layoff" bets and his customer in making further bets the same day (R. Com., No. 25, pp. 130-33; No. 25a, pp. 182-84).

The customers to petitioner's service commonly use fictitious names (R. Com., No. 25, pp. 88, 105); petitioner does not know the real names of his customers and makes no effort to find out (R. Com., No. 27, pp. 539, 560-61, 651); payment for the service must be made in advance by Western Union telegram and money order only (R. Com., No. 27, pp. 602-03, 690); and petitioner keeps no customer list showing names and addresses except to the extent of unused remittances and these are kept by the name used on the telegram and the city of origin (R. Com., No. 27, pp. 577, 603). The charge ranges from $20 for the results of one race to $50 for the results of four or five races (R. Com., No. 27, pp. 603, 605).

Albert Tollin (one of the petitioning partners) testified that the reason why people pay that price for information available at no cost a short time later is to relieve their anxiety (R. Com., No. 27, pp. 581-83). Mr. Tollin further testified that speed or avoidance of a time lag of approximately thirty minutes in furnishing results is the "commodity" that petitioner sells and which gives it a competitive advantage over newspapers and radio stations (R. Com., No. 27, pp. 590-91); and that on a "haphazard

1. Citations are to the transcript of the hearing before the Commission which is part of the numbered docket entries, and will follow petitioner's form of citation: (R. Com., No. —, p. —).

guess" petitioner has somewhere between 500 and 1,000 customers a year who are desirous of purchasing this commodity (R. Com., No. 27, p. 688).

On April 14, 1958, Albert Tollin and his late father Joseph Tollin, signed the following statement witnessed by a Delaware state detective and an investigator for the Chesapeake and Potomac Telephone Company:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors." (R. Com., No. 25a, pp. 271-2)

The sworn testimony of Joseph Tollin before the District of Columbia Public Utilities Commission revealed the nature of petitioner's business and the fact that it was useful to bookmakers and off-track bettors and to no one else (R. Com., No. 27, pp. 604-17).

ARGUMENT.

The Petition Should Be Denied Because It Presents No Federal Question of Substance.

The question presented in this proceeding can be simply stated: Was there evidence presented to the Delaware Public Service Commission of probative value sufficient to justify the findings and opinion of the Commission? The Delaware courts have held that there was.

I. The Petitioner Is Not Being Deprived of a "Legitimate Business Activity."

Petitioner does not deny that the authorities are unanimous in holding that a public utility is justified in terminating telephone service to a customer if it has reasonable grounds to believe that the service will be used for an unlawful purpose. *Hamilton v. Western Union Telegraph Co.*, 34 F. Supp. 928 (N. D. Ohio, 1940); *Tracy v. Southern Bell Tel. & Tel. Co.*, 37 F. Supp. 829 (S. D. Fla., 1940); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (1954); *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (N. D. Ill., 1963), *aff'd* 376 U. S. 782 (1964).

Petitioner's argument is confusing, however, because it repeatedly assumes the lawfulness of petitioner's business in spite of a determination to the contrary by the Delaware Public Service Commission, and the Delaware Superior Court and the Delaware Supreme Court. There is no dispute that petitioner provides instantaneous results of horse races by means of a call service. Article II, Section 17 of the Constitution of the State of Delaware prohibits all forms of gambling except on horse races at race tracks by the use of pari-mutuel or totalizator machines. Title 11, Section 674 of the Delaware Code makes unlawful the dissemination of information in furtherance of gambling

or for gambling purposes by means of a call service. Title 11, Section 677 of the Delaware Code provides that Section 674 shall be deemed an exercise of the police power of the State of Delaware for the protection of the public welfare, morals, etc., of the people of that state.

The Commission found from the evidence presented to it that there exist reasonable grounds to believe that petitioner is engaged in the activity proscribed by the cited laws of Delaware. Petitioner contends that the evidence was insufficient to support such a finding and that its business is, therefore, a lawful activity which cannot be proscribed. But it then assumes the result it seeks by stating that its business is "lawful in itself" (Petition, pp. 16, 22), "lawful in and of itself" (Petition, p. 17), "lawful in character" (Petition, p. 18), "legitimate business activity" (Petition, p. 19), and "conduct inherently lawful" (Petition, p. 23). Such statements cannot, of course, alter the fact that the Commission found from a preponderance of the probative evidence that petitioner's business is unlawful as violative of the public policy of Delaware as declared in the Delaware constitution and statutes.

Petitioner's argument also, to some degree, rests on the assumption that the flash service may be used for a lawful as well as an unlawful purpose by the customer. A reading of the record can lead to only one possible conclusion, the one that was reached by the Delaware Public Service Commission and affirmed by the Delaware Courts, namely that petitioner is disseminating flash results of horse races primarily, if not solely, for the use of bookmakers, and that such flash results are of special use to bookmakers and off track bettors and of no known use to anyone else.

Although petitioner Tollin suggested that the service might be used by horse owners, trainers or touts,[2] he did not identify any of his customers as such, and he offered no reason why such people would require flash results of

2. R. Com., No. 27, pp. 566-70.

the races at premium prices, when the information is available approximately one-half hour later through general news media at a nominal cost or no cost. Mr. Tollin's statement that the service might be used by "anyone who has sent a bet to the track [bets at tracks are permitted by the Delaware Constitution] and is anxious to find out whether his horse won or lost"[3] would stretch anyone's credulity if applied to the 500 to 1,000 customers of petitioner's flash service.

No federal question exists, therefore, because petitioner has not been deprived of a "legitimate business activity" by being denied telephone service. The Delaware Commission and courts have decided that petitioner's activity is unlawful.

II. Petitioner's Rights of Freedom of Speech or of the Press Have Not Been Abridged.

Petitioner's argument on this point seems to be that it is engaged in the business of reporting news after the happening of the event and that this feature of the business makes it comparable to regular and ordinary news media such as radio, television and newspapers.

It is quite evident that the type of "news" provided by petitioner is entirely different from that supplied by ordinary news media, and is furnished to the petitioner's customers for gambling purposes and in furtherance of gambling by use of the respondent's services. See: *Sports News Service, Inc. v. Chesapeake & Potomac Tel. Co.*, 25 P. U. R. 2d 106 (DC PUC 1958).

As noted in *Howard Sports Daily v. Weller*, 17 Md. 355, 18 A. 2d 210 (Ct. App., 1941), the petitioner here is attempting to force the respondent company to participate in its illegal operations. In that case it was held that there was no abridgment of freedom of speech where the court refused to lend its aid to enforce a contract "which is in-

3. R. Com., No. 27, p. 569.

consistent with sound morals or public policy, or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions". The court also noted that the publisher was not being denied the privilege of expressing its opinion on any subject.

The constitutional guarantee of freedom of speech does not apply where the only activity sought to be protected is the transmission of messages in violation of state law and where no effort is made "to utter a single word or express a thought on any topic of public interest or concern". *State v. Western Union Tel. Co.*, 12 N. J. 468, 97 A. 2d 480 (Sup. Ct., 1953); *United States v. Smith*, 209 F. Supp. 907, 918 (E. D. Ill., 1962).

The reasonable exercise of the police power of the state to enforce the state's clearly expressed constitutional and statutory prohibition against gambling should not be defeated by an appeal to "freedom of speech or press" by a petitioner whose operations are designed for gambling purposes or for use in furtherance of gambling.

III. The Commission and the Delaware Courts Decided the Question of the Sufficiency of the Evidence in Accordance With Applicable Decisions of This Court.

Title 26, Section 183 of the Delaware Code provides that the Commission is not bound by the technical rules of evidence in the conduct of its hearings. This Court has held that such authority to accept evidence not conforming to the technical rules of evidence is subject to the qualification that the findings of the administrative body must be supported by substantial evidence or evidence having "rational probative force." *Edison Co. v. Labor Board*, 305 U. S. 197, 229-30 (1938); *Labor Board v. Columbian Co.*, 306 U. S. 292, 299-300 (1938).

The opinions of both the Commission and the Delaware Superior Court, affirmed *per curiam* by the Delaware Supreme Court, specifically recognized and applied the rule

as to the necessity for probative evidence as that rule has been stated by this Court (R. Super. Ct., 20, 10, pp. 13-14; R. Com., No. 19, pp. 10-11). The Attorney General of Delaware recognized, as did the Commission and the Delaware courts, that much of the evidence offered at the hearing would not be competent in a court of law. But the petitioner ignores the fact that the Commission specifically stated in its findings and opinion:

> "We have accepted only that evidence which was within the direct knowledge or experience of the witness, given previously before a competent tribunal under oath or in sworn statements or submitted by stipulation. Thus, we have accepted that portion of Mr. Wassmer's testimony dealing with the Petitioner's subscribers he found to be operating in New Jersey, Pennsylvania and Washington, D. C., which he verified by personal visits to those places. We do not accept similar information received in letters from persons who did not testify under oath before this Commission." (R. Com., No. 19, pp. 10-11)

It can be only by design that petitioner ignores the fact that the Commission and the Delaware court considered all the evidence, rejected that part of it they deemed not probative, and accepted only that evidence in support of their findings which conformed to the standards of probative value set by this Court. Petitioner sets forth in its appendix fourteen pages of excerpts from the record of the Commission and characterizes the matter as incompetent evidence. No discussion or citation of authority is set forth in support of such a characterization.

Petitioner is asking this Court to issue the writ on the ground that the Commission did not have sufficient competent evidence before it on which to base its ruling. As stated above, the transcript of the record before the Commission covers 699 pages. Some of the evidence contained therein is referred to above in the counterstatement of the

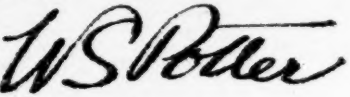
case. The overwhelming weight of the probative evidence shows that petitioner's use of the Telephone Company's service is in violation of the public policy of the State of Delaware.

The petitioner was afforded a fair hearing before the Commission. Since the probative evidence demonstrated conclusively that petitioner was using the service provided by the Telephone Company for an unlawful purpose, petitioner was not deprived of any rights in violation of the Fifth Amendment or the Fourteenth Amendment.

CONCLUSION.

No federal question of substance is presented in the petition and petitioner has not been unconstitutionally deprived of any right. Consequently, no special or important reasons exist for the granting of the petition. The petition for a writ of certiorari to the Supreme Court of the State of Delaware therefore should be denied.

Respectfully submitted,



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